Buitenlands beleid, internationaal ondernemen en ontwikkelingssamenwerking

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Leuven Centre for Global Governance Studies

PAPER NR. 20, JANUARY 2015.

THE SCOPE OF SERVICES CHAPTERS AND REGULATORY AUTONOMY CONSTRAINTS FROM UNCONDITIONAL OBLIGATIONS IN SELECTED EU RTAS

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ABSTRACT

This report first identifies and selects three case studies for this report and the underlying research track. They are the EU-Colombia & Peru, EU-Singapore and EU-Georgia RTAs. The report then introduces a (rebuttable) presumption in favour of WTO consistent interpretation of the provisions of the services chapters of these EU RTAs. Subsequently, the report addresses the scope of the selected RTAs, finding that it is wider than the already wide scope of GATS. Finally, the report assesses constraints on regulatory autonomy from the unconditional obligations in these chapters. These are: (i) transparency obligations, (ii) obligations related to monopolies and exclusive service suppliers, (iii) obligations related to current and capital transactions, and (iv) several GATS-X obligations.

KEYWORDS

Regional trade agreements, RTAs, free trade agreements, FTAs, preferential trade agreements, PTAs, services, unconditional obligations, general obligations MFN, most-favoured-nation treatment, monopolies, transparency, legal remedies.

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SAMENVATTING

Dit rapport bouwt voort op de vorige rapporten uit het onderzoekstraject ‘Het optimaliseren van de liberalisering van de handel in diensten – Begrenzing van de autonome nationale regelgeving?’ van pijler 1 ‘Internationaal en Europees recht’ van het Steunpunt ‘Buitenlands beleid, internationaal ondernemen en ontwikkelingssamenwerking’ voor de Vlaamse regering.

Grensoverschrijdende handel in diensten wordt door zowel de Wereldhandelsorganisatie (WTO) als door 'preferentiële' handelsakkoorden gereguleerd. Op beide niveaus is de Europese Unie (EU) verplichtingen aangegaan die de handel in diensten liberaliseren en bijgevolg de nationale regelgevende autonomie beperken. Er bestaat immers een inherente spanning tussen de liberalisering van handel in diensten en nationale regelgevende autonomie: het vergemakkelijken van handel vereist, op een of andere manier, het inperken van beleidsruimte. Als gevolg van de fragmentering van de internationale regelgeving omtrent handel in diensten is een complex web van verplichtingen ontstaan. Dat heeft geleid tot aanzienlijke onzekerheid over de exacte reikwijdte van deze verplichtingen en, bijgevolg, over hun impact op nationale regelgevende autonomie. Dit onderzoek analyseert de relevante bepalingen uit de Algemene Overeenkomst betreffende de Handel in Diensten (GATS), gesloten in het kader van de WTO, zoals deze van toepassing is op de EU. De complexe structuur en vaagheid van deze overeenkomst heeft aanzienlijke ruimte voor debat over de reikwijdte van vele bepalingen uit GATS gelaten. Daarna, en voortbouwend op deze analyse, wordt de impact van de verplichtingen die voortvloeien uit een aantal handelsakkoorden van de EU op de nationale regelgevende autonomie onderzocht.

In het eerste deel van dit rapport wordt de keuze voor drie handelsakkoorden als casestudy toegelicht. Deze casestudies worden aangehouden voor het volgende rapport betreffende Europese vrijhandelsakkoorden en voor de doctoraatsthesis die in het kader van dit onderzoekstraject wordt geschreven. Op basis van een ‘mapping’ van dienstenverplichtingen en een analyse van bepalingen betreffende verdragsinterpretatie worden de EU-Colombia en Peru, EU-Singapore en EU-Georgië handelsakkoorden geselecteerd. Vervolgens introduceert het rapport een vermoeden van WTO-conforme interpretatie. Dit vermoeden kan weerlegd worden indien het duidelijk is dat de onderhandelaars van de vrijhandelsakkoorden beoogden een andere interpretatie te geven.

Het tweede deel van dit rapport bespreekt de structurele flexibiliteit van de dienstenhoofdstukken van de geselecteerde EU vrijhandelsakkoorden. Deze flexibiliteit bestaat zowel op het niveau van de verplichtingen als op het niveau van de Lijsten van specifieke verbintenissen.

Vervolgens wordt, in de derde sectie, het toepassingsgebied van de dienstenhoofdstukken van de geselecteerde akkoorden nader bekeken. Dit toepassingsgebied is ruimer dan het al ruime toepassingsgebied van GATS. Met name wat betreft het equivalent van de zogeheten 'Modus 3' dienstverlening, is een duidelijke verruiming tegenover GATS vast te stellen. De aanpak die de EU hier hanteert lijkt eerder op het recht op vestiging uit het recht van de Europese interne markt.

Het vierde en laatste deel van het rapport gaat in op de onvoorwaardelijke verbintenissen in de dienstenhoofdstukken van de geselecteerde vrijhandelsakkoorden. Vooreerst moet worden opgemerkt dat er geen onvoorwaardelijke verplichting tot meestbegunstiging in de vrijhandelsakkoorden te vinden is. Ten tweede zijn alle bepalingen met betrekking tot transparantie in de vrijhandelsakkoorden onvoorwaardelijk. Deze bepalingen beperken de regelgevende autonomie echter in slechts beperkte mate, gelet op de voornamelijk procedurele aard van de verplichtingen. Ten derde blijkt slechts één bepaling, in het EU-Colombia en Peru handelsakkoord, betreffende de zogeheten 'binnenlandse regelingen' van Artikel VI GATS onvoorwaardelijk van toepassing te zijn. Omdat deze bepaling uitermate gelinkt is aan de voorwaardelijke equivalenten in GATS en de andere twee EU vrijhandelsakkoorden, wordt deze bepaling niet verder geanalyseerd in dit rapport.

Ten vierde worden verplichtingen betreffende monopolies en exclusieve rechten besproken. De hieronder vallende artikelen die betrekking hebben op mededinging verwijzen grotendeels terug naar nationaal mededingingsrecht. Zij beperken de regelgevende autonomie niet. Daarnaast bevatten andere bepalingen non-discriminatieverplichtingen. Deze bepalingen laten overheden niet toe te discrimineren bij het verlenen van diensten door staatsmonopolies met een commercieel karakter. De Lijst van EU verbintenissen in het EU-Georgië vrijhandelsakkoord omvat daarnaast meer verbintenissen betreffende monopolies. Het gevolg is dat er minder beleidsruimte overblijft om bepaalde monopolies te creëren. Toch lijken deze verbintenissen eerder de realiteit te weerspiegelen. De beperkingen op regelgevende autonomie lijken aldus beperkt. Ten vijfde bespreekt dit rapport verplichtingen met betrekking tot betalingen en

overmakingen. Met uitzondering van de reikwijdte van deze bepalingen, die besproken wordt, is het bijzonder moeilijk de daadwerkelijke impact op regelgevende autonomie te bespreken, gelet op de impact van de (niet besproken) bepalingen omtrent financiële dienstverlening. Ten zesde worden enkele onvoorwaardelijke GATS-X bepalingen besproken. Het gaat om mededinging, overheidsopdrachten, investeringen, subsidies en harmonisering. Met uitzondering van bepalingen omtrent investeringen bevatten deze bepalingen geen beperkingen op regelgevende autonomie, of zijn ze uitgesloten van de geschillenbeslechtingsmechanismen van de vrijhandelsakkoorden.

Bij wijze van conclusie kan worden gesteld dat de onvoorwaardelijke verbintenissen in dienstenhoofdstukken van deze vrijhandelsakkoorden geen substantiële beperkingen op de regelgevende autonomie met zich meebrengen. Het ruime toepassingsgebied van deze hoofdstukken, daarentegen, versterkt de eventuele beperkingen op regelgevende autonomie die het gevolg zijn van, onder meer, de non-discriminatieverplichtingen en de markttoegangbepalingen die in het volgende rapport besproken worden.

Het onderzoek dat aan de basis ligt van dit rapport kadert in het programma ‘Steunpunten voor Beleidsrelevant Onderzoek’ dat gefinancierd wordt door de Vlaamse Overheid. Wij danken de Vlaamse Overheid voor de financiële steun en interesse in het onderzoek.

THE SCOPE OF SERVICES CHAPTERS AND REGULATORY AUTONOMY CONSTRAINTS FROM UNCONDITIONAL OBLIGATIONS IN SELECTED EU RTAS[1]

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[1] This report is part of the Policy Research Centre's research. It is to be situated in Pillar 1, International & European Law, Research Track 2, Making the Most of the Liberalisation of Trade in Services: Constraints on Domestic Regulatory Autonomy? This report, the fifth of this Research Track, addresses the impact of the unconditional general obligations in selected EU RTAs on regulatory autonomy in the EU and builds specifically on the first, third and fourth reports of this Research Track.

The author is grateful to Professor Geert Van Calster and Professor Petros Mavroidis for their comments and suggestions on earlier drafts related to this chapter. Any errors remain solely the author's.

LIST OF ABBREVIATIONS

AB: Appellate Body
ACP: African, Caribbean, Pacific
BITs: Bilateral investment treaties
DCFTA: Deep and Comprehensive Free Trade Area
DSU: Dispute Settlement Understanding
ECJ: European Court of Justice
EFTA: European Free Trade Association
EPA: Economic Partnership Agreement
EU: European Union
EU-C&P RTA: EU-Colombia & Peru Regional Trade Agreement
GATS: General Agreement on Trade in Services
GATT 1994: General Agreement on Tariffs and Trade 1994
GPA: Government Procurement Agreement
ILC: International Law Commission
IMF: International Monetary Fund
MFN: Most-Favoured-Nation
NAFTA: North-American Free Trade Agreement
RTA: Regional Trade Agreement
SCM Agreement: Agreement on Subsidies and Countervailing Measures
TBT Agreement: Agreement on Technical Barriers to Trade
TFEU: Treaty on Functioning of the European Union
VCLT: Vienna Convention on the Law of Treaties
WTO: World Trade Organization

INTRODUCTION

As is the case under the World Trade Organization's (WTO) General Agreement on Trade in Services (GATS),[2] the services chapters of European Union (EU) regional trade agreements (RTAs) generally contain two types of obligation. On the one hand, conditional obligations only apply to sectors for which specific commitments have been scheduled. On the other hand, some unconditional obligations apply to all services covered by the services chapters. In contrast to the conditional obligations, which apply only to sectors in which specific commitments have been scheduled, these obligations cannot be shaped by the parties to the RTA. Hence, from the perspective of a regulator, it is crucial to understand the exact meaning of one's obligations regarding all measures which fall within the wide scope of the services chapter of an RTA.

This report assesses the constraints on regulatory autonomy from the unconditional obligations in the services chapters of a selection of the EU RTAs. Therefore, three aspects must be addressed: (i) the scope of the obligation, (ii) its substantive content, and (iii) any relevant exceptions to the obligation. The scope of the EU RTAs' services chapters is the subject of section C of this report. The scope and substantive content of the unconditional obligations is covered in section D. The relevant exceptions are assessed in the doctoral dissertation that is part of this research track. Finally, we draw some preliminary conclusions.

However, before addressing the aforementioned issues, this paper presents the selection of case studies for this report, the subsequent report on policy space in EU RTAs and the said doctoral dissertation in section A. Moreover, this section sets out the interpretative framework of obligations in the EU RTAs' services chapters. Additionally, in section B, we address the structural flexibility of these services chapters to set the scene for this and the subsequent report on EU RTAs.

It should again be stressed that this report is part of a larger work in process, in which all GATS obligations and exceptions, and the obligations and exceptions in the selected EU RTAs' services chapters will be addressed in a similar way.

[2] Rudolf Adlung, 'Public Services and the GATS' (2006) 9 Journal of International Economic Law 455, 459.

A. CASE STUDY SELECTION

The EU has concluded a vast amount of RTAs and is currently negotiating many more.[3] Although not all of these agreements include provisions on services, the more recent RTAs do (with the exception of the interim Economic Partnership Agreements concluded with developing countries from the African, Caribbean, Pacific (ACP) Group of States).[4] A rough analysis of EU RTA practice allowed us, in a previous report in the context of the Policy Research Centre, to draw up four categories of EU RTAs with services chapters, based on these services provisions.[5]

1. Trade agreements between the EU and official or potential EU member candidates. These countries are being prepared by the RTA for their accession to the EU;
2. RTAs between the EU and neighbouring states;
3. RTAs with services provisions focused on the development of trading partners;
4. EU RTAs with a more outspoken economic rationale, which, as concerns the services provisions of the trade chapters, aim primarily at obtaining global market access for European services and services providers.

It should be pointed out that, based on our analysis of services provisions, the assertion that there is *"only a limited sense of ownership of the agreements by the developing countries* [i.e.

[3] European Commission, *Overview of FTA and Other Trade Negotiations* (Updated 27 October, 2014). For more context, see for example Marise Cremona, 'The European Union and Regional Trade Agreements' in Christoph Herrmann and Jörg Philipp Terhechte (eds), *European Yearbook of International Economic Law*, vol 1 (Springer Verlag 2010); Colin Brown, 'The European Union and Regional Trade Agreements' in Christoph Herrmann and Jörg Philipp Terhechte (eds), *European Yearbook of International Economic Law*, vol 3 (Springer Verlag 2012); Der-Chin Horng, 'Reshaping the EU's FTA Policy in a Globalizing Economy: The Case of the EU-Korea FTA' (2012) 46 Journal of World Trade 301; Patrick A Messerlin, *The EU Preferential Trade Agreements: Defining Priorities for a Debt-Ridden, Growth-Starving EU* (SciencesPo Groupe D'Economie Mondiale Working Paper, 2012); David Kleimann (ed) *EU Preferential Trade Agreements: Commerce, Foreign Policy, and Development Aspects* (European University Institute - Robert Schuman Centre for Advanced Studies and Department of Law 2013); Roberto Bendini, *In-depth Analysis: The European Union's Trade Policy, Five Years after the Lisbon Treaty* (European Parliament Directorate-General for External Policies of the European Union DG EXPO/B/PolDep/Note/2014_76, 2014); Kenneth Heydon and Stephen Woolcock, *Comparing International Trade Policies: The EU, United States, EFTA and Japanese PTA Strategies* (Study for the European Parliament Directorate-General for External Policies of the European Union EXPO/B/INTA/FWC/2009-01/Lot7/36, 2014).

[4] World Trade Organization, 'Regional Trade Agreements Database' (2014) <http://rtais.wto.org/ui/PublicMaintainRTAHome.aspx> accessed 3 March 2014.

[5] Bregt Natens and Jan Wouters, *Mapping Services Liberalisation Commitments in European Union Regional Trade Agreements* (Leuven Centre for Global Governance Studies Working Paper 116, 2013) 11. Also see Heidi Ullrich, *Comparing EU Free Trade Agreements Services* (European Centre for Development Policy Management In Brief 6C, 2004) and Cremona, 'The European Union and Regional Trade Agreements'.

counterparties]. *The EU imposes its own terms and conditions"*[6] also applies to the services chapters of the RTAs and to developed country counterparties.

An analysis of services commitments in these RTAs highlights that the agreements in the first category are mainly aimed at implementing the EU *acquis* into the legal order of the counterparties. In the common strategy for the region, the Stabilisation and Association Process, the EU envisages the accession of these newly independent Balkan states once the Copenhagen criteria are fulfilled.[7] One of the key aspects of the strategy was the drafting of the Stabilisation and Association Agreements, which, according to their preambles, seek to enhance the political, economic and institutional stabilisation in the region through, among other things, enhanced trade and economic cooperation. For the purpose of this research project, the trade pillars of these agreements are not the best case studies; they are unlikely to contain *more* or *other* obligations for the EU.

The RTAs in the second category have a similar objective of integration in the EU internal market, although in a 'lighter' form.[8] The agreements with partner countries in the Mediterranean contain very few binding provisions on trade in services. The European Commission has launched negotiations for a Deep and Comprehensive Free Trade Area (DCFTA) with Morocco (2013) and an ambitious RTA with Libya (on hold at the time of writing, September 2014). Preparations for DCFTA negotiations are on-going with Jordan and Tunisia. Talks on the liberalisation of trade in services with Egypt and Israel are on hold. No such talks are being held with Algeria, Lebanon and Palestine.[9] In the Eastern Neighbourhood, as noted in Table 1, the negotiations for DCFTAs have progressed further: the DCFTAs with Georgia and Moldova were signed and apply provisionally since 1 September 2014. The provisional application of the trade chapter of the EU-Ukraine DCFTA has been postponed until 31 December 2015.[10] Talks with

[6] Matthew McQueen, 'The EU's Free–trade Agreements with Developing Countries: A Case of Wishful Thinking?' (2002) 25 The World Economy 1369, 1384.

[7] The Copenhagen criteria must be met by candidate-Member States to become part of the EU. They include the existence of a functioning market economy and the capacity to cope with competitive pressure and market forces within the EU. See European Council, *Presidency Conclusions of the Copenhagen European Council of 21-22 June* (1993).

[8] Michael Emerson, *Countdown to the Vilnius Summit: The EU´s trade relations with Moldova and the South Caucasus* (Study for the European Parliament Directorate-General for External Policies of the European Union Workshop on Countdown to the Vilnius Summit: The EU's trade relations with Moldova and the South Caucasus EXPO/B/FWC/2009-01/Lot 7/39, 2014) 17 and 22.

[9] European Commission, *Overview of FTA and Other Trade Negotiations*.

[10] European Commission, *Joint Ministerial Statement on the Implementation of the EU-Ukraine AA/DCFTA, Statement/14/276, 12 September* (2014)

Armenia are being assessed after Armenia's declaration to join the Russian customs union.[11] Nevertheless, it may be questioned whether these agreements will include far-reaching commitments for the EU, especially considering the relative economic insignificance of the counterparties and the political and strategic priorities of the European Neighbourhood Policy.[12]

The third category of RTAs comprises EU RTAs that have focused primarily on the development of the trading partner. The main target of these RTAs has been the ACP Group of States. The trade policy picture vis-à-vis these countries is complex. 2007 saw the end of the WTO waiver under which ACP countries were allowed non-reciprocal preferential access to the EU market. An extension of this waiver proved to be politically infeasible at the WTO and a trade regulation solution compliant with WTO law was sought.[13] Articles 36-38 of the 2010 Consolidated Cotonou Agreement obliges the signatory partners to take all the necessary measures to ensure the conclusion of Economic Partnership Agreements (EPAs), which combine trade with technical assistance.[14] The 2007 deadline was not met and no EPA has yet entered into force, although some EPAs are being applied provisionally. In 2014, negotiations for an EPA were concluded with the South African Development Community and West Africa. Both EPAs are being prepared for signature. However, the controversy surrounding the link between development and regional integration on the one hand and whether the EPAs are in effect development-friendly on the other, appears to have played a substantial role in the lack of concluded agreements.[15] The two concluded agreements, with South Africa and Iraq, contain few relevant services provisions. Consequently, the RTAs in the third category do not seem suitable for our purposes.

The fourth category of RTAs are those concluded to open up global markets to European businesses. Analysis of the services provisions in these RTAs confirm the presumption that the

[11] European Commission, *Overview of FTA and Other Trade Negotiations*.

[12] European External Action Service, 'What is the European Neighbourhood Policy?' (2014) <http://eeas.europa.eu/enp/about-us/index_en.htm> accessed 7 March 2014.

[13] Pierre Sauvé and Natasha Ward, *The EC-CARIFORUM Economic Partnership Agreement: Assessing the Outcome on Services and Investment* (European Centre for International Political Economy Paper, 2009) 2.

[14] [2010] OJ L287/3, 4 November 2010, Agreement Amending for the Second Time the Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States and the European Community, signed in Cotonou on 23 June 2000, as first amended in Luxembourg on 25 June 2005. See, on the difficulties and controversy surrounding the conclusion of EPAs with African countries, Getahun Seifu, 'The Interplay of the ACP-EU Economic Partnership Agreements and the Rules of the World Trade Organization: Double Jeopardy for Africa' (2006) 6 Irish Yearbook of International Law 191, where the conundrum between WTO-compatibility and previous non-reciprocal trade measures that focus on development aspects is examined.

[15] Cremona, 'The European Union and Regional Trade Agreements' 262.

most extensive services liberalisation is found in the more recent RTAs of this category. The temporal aspect highlights the increasing liberalisation of trade in services. Unlike for the agreements in the other categories, the explicit intent of these agreements is trade liberalisation. Geo-strategic and -political motives arguably play a lesser role than is the case in the first two categories. Hence, with the noted *caveat* for a DCFTA, the fourth category seems most relevant for our purposes, considering that it is most appropriate to select case studies likely to have the greatest impact on regulatory autonomy. This is the case because the research in this research track aims at setting out the outer limits of constraints on regulatory autonomy resulting from trade liberalisation in services.

Reiterating the above, the most promising case studies are recent RTAs of the fourth category and 'new generation' DCFTAs. The analysis indicated that although within each category many provisions are copied from one agreement to another and that a general template exists, each RTA is unique. We therefore opt to analyse several EU RTAs. Considering these criteria, the following long list of agreements (ordered chronologically) appear most suited as case studies:

a. EU-CARIFORUM RTA;
b. EU-Korea RTA;
c. EU-Central America RTA;
d. EU-Colombia and Peru RTA;
e. EU-Singapore RTA, of which the text is available. The agreement is initialled but has not yet been signed;[16]
f. EU-Georgia DCFTA;
g. EU-Moldova DCFTA;
h. EU-Ukraine DCFTA, of which the text was not available at the time of writing. The agreement has been signed but not yet published.[17]

Considering the crucial importance of treaty interpretation for the purposes of assessing constraints on regulatory autonomy resulting from legal provisions on trade in services, the selection of case studies from the RTAs listed above will take into account the various approaches to treaty interpretation enshrined in the agreements.

[16] The initialling of the text is a step prior to signature that allows all relevant institutions to scrutinise the text. See European Commission, *Factsheet: Trade Negotiations Step by Step* (2013).

[17] The conclusion of the EU-Canada RTA (and publication of the agreement's text) and the negotiations with the U.S. for TTIP, with Japan and in the context of TiSA are not finished on time for this project's purposes.

1. Treaty interpretation in RTAs

1.1 Rules and guidance for interpreting RTAs

To comprehend the meaning of an agreement, one must interpret its provisions. Interpretation is a key tool of adjudication.[18] In the case of RTAs, as with any treaty, one must begin by considering the explicit rules of interpretation enshrined in the agreement itself. In the absence of such provisions, the rules of interpretation in the Vienna Convention on the Law of Treaties (VCLT), enshrined in Articles 31-33, apply, as they are customary international law. Applying the VCLT rules of interpretation leaves an interpreter ample flexibility as the VCLT rules of interpretation are not exhaustive and can provide possibilities such as, for example, being able to apply different weights to the different interpretational methods mentioned in the VCLT.[19]

In the case of the WTO, Article 3.2 of the Dispute Settlement Understanding (DSU) holds that the dispute settlement bodies serve to clarify the existing provisions of the covered agreements in accordance with customary rules of interpretation of public international law. WTO case law is of the utmost importance in understanding the constraints on regulatory autonomy that result from a Member's obligations. Many RTAs contain dispute settlement mechanisms. In the case of the EU, the large majority of RTAs with services chapters contain dispute settlement mechanisms of the quasi-judicial model, i.e. the complainant has an automatic right of access to dispute settlement, where the dispute is settled by an ad hoc adjudicating body and a standing body for appeals.[20] However, there is no dispute settlement practice by these ad hoc bodies. Reasons for continuing to include such mechanisms in RTAs are among others their potential deterring effect vis-à-vis possible violations, or the necessity of a 'stick' for credibility during negotiations.[21]

However, a peculiar feature of most RTAs' dispute settlement mechanisms is a striking lack of case law. Although many RTAs contain dispute settlement mechanisms, only the European Court of Justice (ECJ), the European Free Trade Association (EFTA) Court, the North American

[18] Joost Pauwelyn and Manfred Elsig, 'The Politics of Treaty Interpretation: Variations and Explanations across International Tribunals' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge University Press 2013) 445.
[19] Ibid 448. The authors set out a framework for explaining variation in treaty interpretation by international tribunals.
[20] Claude Chase and others, *Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements – Innovative or Variations on a Theme?* (World Trade Organization Economic Research and Statistics Division Staff Working Paper ERSD-2013-07, 2013) 10-11 and 54-55.
[21] Ibid 47.

Free Trade Agreement (NAFTA) dispute settlement mechanisms, the MERCOSUR dispute settlement mechanism, the Court of Justice of the Andean Community, and the Central American Court of Justice of the Central American Common Market show *"significant activity"*.[22] Only a handful of other cases have been noted: one in the case of the Dominican Republic-Central America-United States Free Trade Agreement, four at the Caribbean Court of Justice, and four in the context of the Chile-MERCOSUR Free Trade Agreement (ALADI).[23] Insofar as information is publicly available, no cases have been brought under EU RTA dispute settlement. A key message from the WTO's 2011 *World Trade Report* was that Members continue to use WTO dispute settlement in relation to RTA partners.[24] In 82 of the 443 disputes brought before the WTO at that time, the complainant and respondent were RTA partners.[25]

Nonetheless, the practical importance of RTAs[26] highlights that interpreting the legal provisions in EU RTAs is likely to play an important role. Regardless of the lack of use of RTA dispute settlement, the legal meaning of RTA provisions and their interpretation remains crucial in understanding how RTAs limit regulatory autonomy. Being aware of the lack of interpretational guidance from case law, first, concerning the interpretational rules of the RTAs and, second, concerning the substantive content of the provisions, one must resort to an interpretation based on the text of the agreement and the available interpretational tools.

1.2 Treaty interpretation in the case study long list

In order to determine how to interpret an agreement, one must begin by assessing the text of the agreement itself. In this list of case studies, three different types of rules of interpretation are found. First, Article 14.16 of the EU-Korea RTA reads

> *"Any arbitration panel shall interpret* [all provisions of this Agreement, unless otherwise provided] *in accordance with customary rules of interpretation of public international law, including those codified in the Vienna Convention on the Law of Treaties. Where an obligation under this Agreement is identical to an obligation*

[22] Ibid 46.
[23] Ibid 47.
[24] World Trade Organization, *World Trade Report 2011: The WTO and Preferential Trade Agreements: From Co-existence to Coherence* (2011) 15.
[25] Ibid 176.
[26] Major trade law firms such as Akin Gump Strauss Hauer & Feld, Appleton Luff, King & Spalding, Mayer Brown, Sidley Austin, Van Bael & Bellis or White & Case consistently include advice on bilateral agreements in their description of the services provided by their respective trade teams.

under the WTO Agreement, the arbitration panel shall adopt an interpretation which is consistent with any relevant interpretation established in rulings of the WTO Dispute Settlement Body (hereinafter referred to as the 'DSB'). The rulings of the arbitration panel cannot add to or diminish the rights and obligations provided for in [all provisions of this Agreement, unless otherwise provided]*."*[27]

The EU-Singapore RTA includes a provision that is substantially the same in Article 15.18. In the case of the EU-Central America RTA, it is added in Article 322.1 that due account must be taken of the fact that the parties must perform the agreement in good faith and avoid circumvention of their obligations.

Second, the EU-CARIFORUM RTA is similar to the EU-Korea example, except that Article 219 does *not* contain a reference to interpretations by the WTO dispute settlement organs. Article 317 of the EU-Colombia and Peru RTA is identical to this provision. Hence, interpretations should be made in accordance with customary rules of interpretation only, without adding to or diminishing the rights and obligations of the parties. Here, WTO law is not granted explicit relevance for interpretation.

Third, the DCFTAs with Georgia and Moldova require RTA dispute settlement organs to take into account the panels' and AB's interpretation of WTO law. Articles 265 EU-Georgia DCFTA and 401 EU-Moldova DCFTA read:

"The arbitration panel shall interpret the provisions [of Title V (Trade and Trade-related Matters) of this Agreement] *in accordance with customary rules of interpretation of public international law, including those codified in the Vienna Convention on the Law of Treaties. The arbitration panel shall also take into account relevant interpretations established in reports of panels and the Appellate Body adopted by the WTO Dispute Settlement Body (DSB)."*

Two possible situations emerge in interpreting the EU RTAs' services chapters: (i) either provisions in the RTA are identical to a GATS provision, or (ii) they are not identical to a GATS

[27] Note the similarities with part of Article 3.2 DSU, which reads in relevant part:

"[…] *The Members recognize that* [the dispute settlement system of the WTO] *serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."*

provision. This in turn raises three questions: (i) what is an 'identical obligation'; (ii) should RTA arbitration panels deviate from WTO case law; and (iii) is there an influence of EU law on RTA provisions that is relevant for treaty interpretation?

1.2.1 An 'identical obligation'

It must first be determined what constitutes an 'identical obligation' in the sense of the treaty interpretation provisions of the EU-Korea, EU-Central America, EU-Singapore and EU-Ukraine RTAs. There does not appear to be a textual basis for limiting the meaning of 'identical obligation' to those obligations that are identically phrased to the corresponding GATS obligation. Rather, the interpretational rule extends to substantively identical obligations. It has been remarked that *"when RTA negotiators seek language to which both/all parties are comfortable with, WTO language often provides a convenient 'model' or yardstick which is acceptable."*[28] However, the fact that language is borrowed from GATS does not necessarily indicate that the substance of the obligation is the same. A few examples may highlight the limits to such an approach. First, Articles 7.5 EU-Korea RTA, 170 EU-Central America RTA, 8.5 EU-Singapore RTA and 93 EU-Ukraine DCFTA each contain a market access obligation for cross-border trade in services that is phrased in a very similar way to Article XVI:1 and 2 (a)-(c) GATS. The differences in text are minor, e.g. in the example of the EU-Korea RTA "adopt or maintain" versus "maintain or adopt", "the requirement of an economic needs test" versus "the requirements of an economic needs test". It would seem that the obligation in this example is identical regardless of the slightly different wording.

Second, the national treatment obligation for cross-border trade in services contained in Articles 7.6 EU-Korea RTA, 171 EU-Central America RTA, 8.6 EU-Singapore RTA and 94 EU-Ukraine DCFTA is again formulated in almost identical wording as Article XVII GATS. However, the scope of Articles 7.6 EU-Korea RTA and 94 EU-Ukraine DCFTA may differ from that of Article XVII GATS. The national treatment obligation in the former only applies to sectors in which specific market access commitments have been scheduled,[29] as the EU schedule in the

[28] Locknie Hsu, 'Applicability of WTO Law in Regional Trade Agreements: Identifying the Links' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press 2006) 525.

[29] Limitations on national treatment are scheduled in the same column as, and not differentiated from, limitations on market access pursuant to [2011] OJ L127/6, 14 May 2011, Free trade Agreement between the European Union and the Republic of Korea Article 7.7, [2012] OJ L346/3, 15 December 2012, Association Agreement between the European Union and Central America Article 172 and EU-Singapore RTA Article 8.7 (2).

agreement only contains one column and not three (market access, national treatment and additional commitments) as is the case for GATS. Hence, the relationship between the market access and national treatment obligations in the EU-Korea RTA and EU-Ukraine DCFTA may differ from that in GATS, in which the structure of the Members' Schedule and Article XX:2 GATS attempt to delineate between both obligations (although there is still substantial confusion on this delineation). Equally, the Schedules in the EU-Central America and EU-Singapore RTAs contain one column, merging national treatment and market access limitations, but do not explicitly state that national treatment only applies to sectors in which market access commitments have been scheduled. This may not have any practical importance, but this latter approach appears to be clearer. Similarly, the interpretative footnote 10 to Article XVII GATS has been added to the national treatment obligation in the three RTAs as a fourth paragraph. It is unclear whether this leads to the conclusion that Articles 7.6 EU-Korea RTA, 171 EU-Central America RTA, 8.6 EU-Singapore RTA and Article 94 EU-Ukraine DCFTA are not 'identical' to Article XVII GATS, but such a conclusion is clearly not inconceivable.

Third, Article 7.8 EU-Korea RTA contains an MFN obligation for cross-border trade in services which is worded similarly but phrased differently to Article II GATS.[30] The GATS Most-Favoured-Nation (MFN) obligation requires each Member to accord immediately and unconditionally to services and service suppliers of any other Member, treatment no less favourable than that it accords to like services and service suppliers of any other country. The EU-Korea MFN obligation, however, requires the same treatment only insofar as the more favourable treatment is granted in the context of an economic integration agreement signed after the entry into force of the EU-Korea RTA, and only insofar as the treatment is not granted under sectoral or horizontal commitments for which the regional economic integration agreement stipulates a significantly higher level of obligations than the commitments in the EU-Korea RTA. Although the rationale behind and wording of both provisions is very similar, the provisions differ in their scope and effect. However, it can still be questioned whether the *obligation* is identical in a strict sense. As these examples indicate, an analysis of the substance of a provision, which takes into account its language, but also the context and other interpretative tools, must be made on a case-by-case basis.

[30] Article 7.14 EU-Korea contains an identical MFN obligation for establishment.

The EU-Colombia & Peru and EU-Singapore RTAs do not contain an MFN obligation in their services chapters. Article 88.2 EU-Ukraine DCFTA provides an integrated MFN and national treatment obligation for establishment, but not for cross-border trade in services.

1.2.2 The case for WTO consistent interpretation

The second question arising from the interpretational provisions in the selected EU RTAs is whether provisions in the RTAs should be interpreted in conformity with WTO interpretations. Based on the overview above, there are four main avenues for interpretation:

a. an identical obligation is interpreted 'in consistency with' WTO case law;
b. an obligation, whether identical or non-identical, is interpreted by 'taking into account' WTO case law;
c. a non-identical obligation is interpreted in accordance with customary rules of interpretation; and
d. an identical obligation is interpreted in accordance with customary rules of interpretation.

At first sight, from a. to d., the risk of interpretational variance augments. Considering that WTO treaty interpretation is based on customary rules of interpretation, and that there is leeway within these rules for a different approach to the one taken in WTO dispute settlement practice, how far can RTA arbitration panels deviate from WTO treaty interpretation in situations b., c. or d.? A director at the Directorate General for Trade of the European Commission noted, in his personal capacity, that

> *"The complexity of finding an 'ideal' situation to the relationship between WTO and bilateral dispute settlement procedures is due to the fact that the substantive law of free trade agreements is very largely influenced—and, indeed, dependent upon—WTO law."*[31]

1.2.2.1 The presumption of WTO consistent interpretation

For the three main reasons set out below, it is argued that there is a rebuttable 'presumption' that arbitration panels should interpret RTA provisions in consistency with WTO case law interpretations. This approach would improve the predictability and coherence of international

[31] Ignacio Garcia Bercero, 'Dispute Settlement in European Union Free Trade Agreements: Lessons Learned?' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press 2006) 399.

trade law, and is therefore *"highly desirable"*.[32] Despite no direct legal obligation to follow WTO interpretations, RTA arbitration panels should apply a mild form of '*de facto stare decisis*' (i.e. the doctrine of precedent), in which precedents are *"followed for extra- and quasi-legal reasons, including custom and habit, and not as a matter of legal requirement."*[33] In other words, in the case of these RTAs, the arbitration panels should heed WTO jurisprudence.[34] However, it is sufficient for our purposes that the precedents are non-binding but highly persuasive.[35] Such a *"de facto precedent, like a de jure one, creates a presumption that it is to be followed unless a very good reason for a departure exists."*[36] Hence, although RTA arbitration panels cannot expressly draw upon WTO case law if the RTA's rules of interpretation only allow the panel to interpret in the light of principles of customary international law, a *de facto* identical outcome can and should be reached by following the WTO dispute settlement organ's interpretational argumentation, which itself is based on customary principles of treaty interpretation. This follows the *"call for the "awareness" by jurisdictions and adjudicators of others' jurisdictions"*, based on *"the general principle of good faith and principles of interpretation"*.[37] In the words of the main proponent of *de facto stare decisis*:

> *"in a de facto stare decisis regime, a prior holding is like a cane that the adjudicator is only in theory – specifically, legal theory – free to use or toss, but in fact always uses whenever the opportunity arises, or in the rare cases when it chooses to toss the cane, it takes great care in explaining why."*[38]

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[32] Ibid, who makes this claim as concerns bilateral provisions that are largely independent from WTO obligations. As concerns areas of overlap between WTO and RTA obligations or where an RTA obligation reproduces the WTO obligation without referring to it, he notes *"it is difficult to see how a bilateral panel could properly apply the provisions of the FTA without also referring to WTO law"*. For similar conclusions on the benefits of this approach, see Hsu, 'Applicability of WTO Law in Regional Trade Agreements: Identifying the Links' 551-552.

[33] Marc L Busch, 'Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade' (2007) 61 International Organization 735, 740, summarising Bhala's three articles referenced below.

[34] Hsu, 'Applicability of WTO Law in Regional Trade Agreements: Identifying the Links' 526-527.

[35] David M Palmeter and Petros C Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure* (2nd edn, Cambridge University Press 2004) 56. Bhala argues in favour of a binding form of precedent in the WTO context throughout his trilogy on the subject. See Raj Bhala, 'The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)' (1999) 14 American University International Law Review 845, 875.

[36] Raj Bhala, 'The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)' (1999) 9 Journal of Transnational Law & Policy 1, 3. According to Semertzi, the fact of *'incorporation' of WTO provisions in EU RTAs "brings with it also a certain portion of WTO "object and purpose" which compels a WTO consistent interpretation and effectively restricts surprises in judicial integration."* Aliki Semertzi, 'The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements' (2014) 51 Common Market Law Review 1125, 1152-1153.

[37] Kyung Kwak and Gabrielle Marceau, 'Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements' (2003) 41 The Canadian Yearbook of International Law 83, 108.

[38] Bhala, 'The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)' 939-940.

1.2.2.2 Supremacy of the WTO agreements

The first reason to interpret RTA provisions in consistency with WTO case law is based on the alleged supremacy of the WTO agreements vis-à-vis RTAs. Article 41.1 VCLT addresses situations in which two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves as individual parties. Article 41 VCLT is not considered to be customary international law as such but it is said that the principle embodied in the article *"reflects customary law."*[39] The provision allows such modification in two situations. First, in subparagraph (a), if the possibility of such a modification is provided for by the treaty, and second, in subparagraph (b), if the possibility of such a modification is not prohibited by the treaty. In the latter case, two additional requirements need to be fulfilled. First, the modification does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations. Second, the modification does not relate to a provision from which derogation is incompatible with the effective execution of the object and purpose of the multilateral treaty as a whole. According to two authors, the WTO rules on the formation of RTAs, *in casu* Article V GATS, are to be considered superior to RTA rules on the basis of Article 41.1 (a) VCLT as the formation of the RTA is only in accordance with this provision if it respects the rules set out by Article V GATS.[40] This creates a *"constitutional and hierarchical relationship between WTO rules and RTAs"*.[41] The argument is *in se* limited to compliance with Articles XXIV GATT 1994 and V GATS. However, it may be questioned whether Article 41.1 (a) VCLT should be applied: does Article V GATS indeed provide for the possibility of modification?[42] Although arguably the case, in our view, it may equally be argued that subparagraph (b) is applicable. The modification is neither expressly prohibited, nor expressly allowed. Article V

[39] Kerstin Odendahl, 'Article 41' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties* (Springer 2012) 723.

[40] Thomas Cottier and Marina Foltea, 'Constitutional Functions of the WTO and RTAs' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press 2006) 56-57. The authors acknowledge that there may be some discussion as to the customary international law nature of Article 41 VCLT in a litigation setting (this is confirmed in Odendahl, 'Article 41' 723). Also see Mary E Footer, *An Institutional And Normative Analysis of the World Trade Organization* (Martinus Nijhoff 2006) 231, footnote 215 and the citations there, where she assumes that Pauwelyn equally considers Article 41 VCLT in this regard, whilst Trachtman clearly does not.

[41] Cottier and Foltea, 'Constitutional Functions of the WTO and RTAs' 57.

[42] The examples given of such clauses in Odendahl, 'Article 41' 723-724 differ from Article V GATS: *"*[n]*othing in the present Convention shall preclude States from concluding international agreements* confirming or supplementing or extending or amplifying *the provisions thereof"* (emphasis added); *"The Contracting Parties may conclude between themselves bilateral or multilateral agreements only in order* to supplement *the provisions of this Convention or to facilitate the application of the principles contained therein"*.

GATS is an exception[43] and therefore not explicitly a provision allowing modification of GATS between the RTA parties (even if in effect this is what an RTA does). If that is the case, the RTA should fulfil the two conditions contained in the provision.[44] The first condition requires that the rights of the other Members are not prejudiced by the RTA. That would appear to be the case. In principle, the RTA remains *res inter alios*, i.e. a matter between the parties to the RTA, for those Members.[45]

The second condition is more interesting: it requires that the effective execution of the object and purpose of GATS as a whole is not frustrated by the modification of a certain provision. The Panel in *China – Publications and Audiovisual Products* referred to the expansion of trade in services under conditions of transparency and progressive liberalisation and as a means of promoting the economic growth of all trading partners and the development of developing countries as the *"general object and purpose"* of GATS.[46] A case can be made that RTAs do not necessarily contribute to this object and purpose, for example because they do not promote the interests of all WTO Members nor contribute to progressive rounds of multilateral services liberalisation. However, this is irrelevant to the question at hand, where it should be asked whether *interpretations* that are not consistent with GATS case law frustrate the object and purpose of GATS. Here, it may be argued that the establishment of a multilateral framework for trade in services, with a view to the expansion of such trade under conditions of transparency and progressive liberalisation, could be hampered by inconsistent interpretations between RTAs and GATS, if not frustrated entirely.

1.2.2.3 Systemic integration

The second reason for interpreting provisions of RTAs in consistency with WTO case relates to the principle of systemic integration. Article 31.3 (c) VCLT requires the RTA arbitration panel to take into account, together with the context of the terms of the treaty and the treaty's object and purpose, *"any relevant rules of international law applicable in the relations between the parties."*

[43] Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (3rd edn, Cambridge University Press 2013) 664.
[44] The notification requirement of Article 41.2 VCLT would be fulfilled by the notification of the RTA to the WTO.
[45] Odendahl, 'Article 41' 725.
[46] *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Products* WT/DS363/R, Panel report adopted 19 January 2010 paras. 7.1219 and 7.1348.

The AB noted that 'relevant' means concerning the subject matter at issue.[47] According to the International Law Commission (ILC)'s report on fragmentation of international law, this rule expresses the principle of 'systemic integration'.[48] The ILC notes that:

> *"None of this predetermines what it means to "confront" a norm with another or how they might enter into "concurrence". These matters must be left to the interpreter to decide in view of the situation. The point is only - but it is a key point - that the normative environment cannot be ignored and that when interpreting the treaties, the principle of integration should be borne in mind. This points to the need to carry out the interpretation so as to see the rules in view of some comprehensible and coherent objective, to prioritize concerns that are more important at the cost of less important objectives. This is all that article 31 (3) (c) requires; the integration into the process of legal reasoning - including reasoning by courts and tribunals - of a sense of coherence and meaningfulness. Success of failure here is measured by how the legal world will view the outcome."*[49]

The AB endorsed this interpretation in the context of applying non-WTO law to interpret WTO law.[50] If the WTO agreements are applicable in the relations between the parties, i.e. all parties are WTO Members, and the rule concerns the same subject matter, RTA arbitration panels should take into account these rules and, hence, their interpretation by WTO dispute settlement bodies. The arbitration panels are only obliged to do so in specific situations according to the treaty interpretation provisions in the EU RTAs, but should take into account the normative environment of international trade law. In our view, ignoring WTO case law would run counter to the principle of systemic integration. Similarly, it may be said that WTO case law provides context in the sense of Article 31 VCLT.[51] According to Article 38.1 (d) of the Statute of the International Court of Justice, judicial decisions may also be subsidiary means for the determination of rules of law, although Article 59 of the Statute explicitly states that decisions of the court are not binding precedents.

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[47] *European Communities - Measures Affecting Trade in Large Civil Aircraft* WT/DS316/AB/R, AB report adopted 1 June 2011 para. 846.

[48] International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (A/CN4/L682, Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi, 2006) para. 413.

[49] Ibid para. 419.

[50] *EC and certain member States - Large Civil Aircraft (AB)* para. 845.

[51] Hsu, 'Applicability of WTO Law in Regional Trade Agreements: Identifying the Links' 527. At pp. 523-540, Hsu equally argues that certain interpretations from WTO case law may become customary international law. These interpretations are subsequently relevant for RTA dispute settlement unless the parties explicitly opted out of customary rules of interpretation.

1.2.2.4 Pragmatic reasons

The third reason is a pragmatic preference for the multilateral dispute settlement organs in the context of the fragmentation of international trade law. In comparison to the body of case law from any other international tribunal, the WTO body of case law is both very substantial and well-developed. Therefore, it also has *"procedural superiority"* over RTA dispute settlement.[52] Multilateral dispute settlement may even be *"intrinsically superior to RTA dispute settlement"* and perceived as more legitimate because of, among others, neutrality of panellists and its rules-based approach.[53] When confronted with the interpretation of provisions which are related to—not just identical to— WTO law, or find their foundation therein, there would be little sense for an ad hoc EU RTA arbitration panel to go against WTO case law interpretation, unless there is a clear indication that the parties intended to diverge from the meaning of the WTO provision. If an RTA has a *telos* similar to that of the WTO, the RTA's dispute settlement mechanism *"will be inspired by the GATT/WTO case law when interpreting*" the RTA.[54] Of course, the RTA panel should not apply WTO law, but it should use relevant WTO (case) law to interpret an RTA provision if the conditions of Article 31.3 (c) VCLT are fulfilled.[55] In the case of the quasi-universal membership to the WTO, the rule will only need to be 'relevant'.

Moreover, only in very specific cases can a WTO panel decline to exercise procedurally validly established jurisdiction.[56] Otherwise, according to Article 23 DSU, the jurisdiction of the WTO dispute settlement system is exclusive and compulsory as concerns the covered agreements.

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[52] Panagiotis Delimatsis, 'The Fragmentation of International Trade Law' (2011) 45 Journal of World Trade 87, 115.

[53] William J Davey, 'Dispute Settlement in the WTO and RTAs: A Comment' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press 2006) 354-357; William J Davey and André Sapir, 'The Soft Drinks Case: The WTO and Regional Agreements' (2009) 8 World Trade Review 5, 22.

[54] Delimatsis, 'The Fragmentation of International Trade Law' 109.

[55] In WTO case law, the panels and AB cannot *"determine rights and obligations outside the covered Agreements"*. See *Mexico - Tax Measures on Soft Drinks and Other Beverages* WT/DS308/AB/R, AB report adopted 24 March 2006 para. 56.

[56] The AB noted in *European Communities - Export Subsidies on Sugar* WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, AB report adopted 19 May 2005 para. 312 that

> *"We see little in the DSU that explicitly limits the rights of WTO Members to bring an action; WTO Members must exercise their "judgement as to whether action under these procedures would be fruitful", by virtue of Article 3.7 of the DSU, and they must engage in dispute settlement procedures in good faith, by virtue of Article 3.10 of the DSU."*

This finding was confirmed in *Mexico - Taxes on Soft Drinks (AB)* footnote 101. See Bregt Natens and Sidonie Descheemaeker, *Making Sense of the Seemingly Insensible - 'Procedural' Good Faith as a Legal Impediment to Validly Established Jurisdiction* (SSRN Working Paper Series, 2014).

Hence, a Member may, in many cases, bring a case before the WTO if it is dissatisfied by the outcome at the level of RTA dispute settlement. For example, there is an overlap between WTO and NAFTA provisions and the latter's dispute settlement mechanism has adjudicated on issues that could have been brought before a WTO panel.[57] It has been argued that this does not conflict with the principles of *res judicata* (i.e. a matter already decided that cannot be brought again) or *lis pendens* (i.e. a pending matter) since at the very least the applicable law differs.[58] However, the risk of fragmentation and turf wars resulting from such a situation is not beneficial to any of the parties involved.[59] Only in cases where the dispute is based on a WTO+ (i.e. (i.e. obligations found in a WTO agreement but going further than their WTO counterpart) or WTO-X (i.e. an obligation not found in a WTO agreement but related to the subject matter of such an agreement) provision, or in cases where a panel could decline to exercise its jurisdiction, would this risk not arise.

1.2.2.5 Rebutting the presumption

Lastly, as noted, the 'presumption' of interpreting EU RTA provisions consistently with WTO case law is rebuttable. Of course, the RTA interpreter is not stringently bound by WTO interpretations. The RTA is a separate treaty so its interpretation should not blindly or slavishly follow WTO case law.[60] An RTA perhaps has its individual structural bias.[61] The WTO agreements do not contain a statement of supremacy.[62] If the outcome of applying the relevant rules of interpretation is that the provisions of the RTA should be interpreted differently than that indicated by a WTO case law, the interpreter should follow this course. Two situations immediately come to mind. First, the context, object and purpose of the agreements may differ, which may lead to a difference in interpretation—as is the case in the national treatment

[57] On the risks of and problems with forum shopping in this context, see Busch, 'Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade'.

[58] Kwak and Marceau, 'Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements' 103; Davey and Sapir, 'The Soft Drinks Case: The WTO and Regional Agreements' 14 (on *res judicata*).

[59] This risk is of course not limited to WTO-RTA turf wars, as evidenced by e.g. the 'Swordfish' and 'Herring' disputes between, respectively, the EU and Chile and the EU and the Faroe Islands. In both cases, claims were filed both at the WTO (WT/DS193, *Chile – Measures affecting the Transit and Importing of Swordfish*; and WT/DS469, *European Union – Measures on Atlanto-Scandian Herring*) and before the International Tribunal for the Law of the Sea. Amicable settlements were found.

[60] Hsu, 'Applicability of WTO Law in Regional Trade Agreements: Identifying the Links' 541.

[61] Henning Grosse Ruse-Khan, *A Comparative Analysis of Policy Space in WTO Law* (Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper 08-02, 2008) 9.

[62] Armand C M de Mestral, 'Dispute Settlement Under the WTO and RTAs: An Uneasy Relationship' (2013) 16 Journal of International Economic Law 777, 809-810.

obligations of Article 2.1 of the Agreement on Technical Barriers to Trade (TBT Agreement) and III:4 of the General Agreement on Tariffs and Trade (GATT 1994).[63] Second, there may be an indication that the use of a different term suggests a different interpretation from a WTO term. However, if there is no such indication, or it is insufficient, preference should be given to interpretation in conformity with WTO law. This analysis needs to be made on a case-by-case basis, taking into account all relevant factors, but could be based on Article 31.4 VCLT type exceptions to the general principle of interpretation in accordance with the ordinary meaning of the text of a treaty.[64] This provision states that a special (as opposed to ordinary) meaning—in this case a special meaning is a meaning different from WTO law—shall be given to a term if it is established that the parties so intended.

If the presumption is rebutted, the question arises as to whether there should be coherence between the non-WTO compliant interpretations given to provisions in different RTAs. It is submitted that this is not the case if the treaty interpretation mechanisms do not support such a finding. For example, one of the objectives of the EU-Georgia DCFTA is the integration of the Georgian economy into the EU internal market while the EU-Colombia & Peru RTA appears to be concerned more with a GATS-type balance between trade liberalisation and other concerns. It would thus seem defensible that treaty provisions in these agreements are interpreted differently.

2. The case studies

Based on the mapping of services commitments in EU RTAs—which concludes that it is most relevant to assess 'new generation' RTAs—and the typology for EU RTA interpretation—in which three relevant options arise—, the following agreements are selected as case studies for the analysis of constraints on regulatory autonomy from the preferential liberalisation of trade in services:

a. from the group of the EU-Korea RTA, the EU-Central America RTA or the EU-Singapore RTA, the selected case study is the EU-Singapore RTA. The agreement is the most

[63] See e.g. *United States - Measures Affecting the Production and Sale of Clove Cigarettes* WT/DS406/AB/R, AB report adopted 24 April 2012 para. 181.

[64] Oliver Dörr, 'Article 31' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties* (Springer 2012) 568.

recent of these three agreements and moreover, as concerns services, constitutes the most important one from an economic point of view;[65]

b. from the DCFTAs, the EU-Georgia DCFTA, the EU-Moldova DCFTA or the EU-Ukraine DCFTA, the selected agreement is the EU-Georgia DCFTA. These agreements are likely to be very similar, but total trade in services in Georgia is twice as large in comparison to Moldova. At the time of writing, July 2014, the text of the EU-Ukraine DCFTA was not yet available.[66]

   Interestingly, both Georgia and Singapore are examples of *"the few countries in the world that has chosen a radical unilateral free trade opening of its economy to the whole of the world."*[67] Consequently, both Georgia and Singapore can be expected to have had a 'constraining' impact on the negotiations, are they would have been looking for relatively unfettered liberalisation;[68]

c. from the group of the EU-CARIFORUM RTA or the EU-Colombia & Peru RTA, the selected RTA is the latter. The EU originally negotiated the agreement with the Andean Community, which also includes Bolivia and Ecuador. At the time of writing, the EU and Ecuador concluded negotiations on Ecuador joining the RTA. Consequently, aside from being more recent agreements, the RTA may evolve into a full-fledged EU-Andean Community RTA. Considering that EU trade in goods with the Andean Community is three times as large as with the CARIFORUM states, the economic relevance of the Andean Community for services is likely to be larger as well.[69]

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[65] The EU exported 16.6 billion € of services to Singapore in 2012, and imported 12 billion € worth of services from Singapore. EU services exports to Korea amounted to 9.6 billion € in 2012, imports were 4.6 billion €. No data on trade in services is available for EU-Central America trade. See European Commission, 'South Korea: Main Indicators' (2013) <http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_111834.pdf> accessed 25 July 2014; European Commission, 'Singapore: Main Indicators' (2013) <http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_112009.pdf> accessed 25 July 2014.

[66] There are no data for trade in services with the EU. Total trade in services for Georgia in 2012 amounted to 3.0 billion €, for Moldova this is limited to 1.4 billion €. See European Commission, 'Moldova: Main Indicators' (2013) <http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_111540.pdf> accessed 25 July 2014 and European Commission, 'Georgia: Main Indicators' (2013) <http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_111507.pdf> accessed 25 July 2014. Notably, Georgia has moved on the World Bank Group Doing Business Ranking from 100th place in 2006 to eight in 2013. See World Bank, 'Doing Business Economy Ranking' (2013) <http://www.doingbusiness.org/rankings> accessed 24 July 2014.

[67] Emerson, *Countdown to the Vilnius Summit: The EU´s trade relations with Moldova and the South Caucasus* 13. Emerson refers to *"the paradoxical situation"* where *"the big and strong EU economy remained relatively closed"* to the relatively weaker but already completely open economies of the counterparts.

[68] See as concerns Georgia, Patrick A Messerlin and others, *An Appraisal of the EU's Trade Policy Towards its Eastern Neighbours: The Case of Georgia* (SciencesPo and Center for European Policy Studies, 2011) 17.

[69] See European Commission, 'Countries and Regions: Caribbean' (2014) <http://ec.europa.eu/trade/policy/countries-and-regions/regions/caribbean/> accessed 24 July 2014 and European

Consequently, the three case studies analysed in this report are the EU-Singapore RTA (EU-Singapore), the EU-Georgia DCFTA (EU-Georgia) and the EU-Colombia & Peru RTA (EU-C&P).

B. THE STRUCTURAL FLEXIBILITY OF THE SELECTED EU RTAS

An important aspect in the context of regulatory autonomy is the structural flexibility of services disciplines. The structure of the services chapters of the EU-Colombia & Peru RTA, the EU-Singapore RTA and the EU-Georgia DCFTA differs from that of GATS. The following two elements are relevant: the structure of obligations and the scheduling approach.

1. Flexibility in the structure of obligations

A notable difference between the three selected EU RTAs and GATS is the division of obligations in relation to the mode of supply. Whilst GATS obligations are the same for each mode, the RTAs contain separate obligations for establishment, cross-border supply of services and temporary presence of natural persons for business purposes. As discussed below, these categories correspond roughly to GATS Modes 3, 1 and 2, and 4 respectively.

Additionally, the RTAs do not contain an MFN obligation, and consequently no MFN exemptions. The subsection on domestic regulation, contained in Articles 131 and 8.18-8.20 respectively, is limited to sectors in which specific commitments have been undertaken. In the EU-Singapore RTA, it is added that the provision on domestic regulation only applies to the extent that the specific commitments apply. This appears to incorporate the reservations on specific commitments and consequentially render the domestic regulation provision a specific commitment rather than a conditional general obligation.

2. Flexibility in scheduling specific commitments

As with GATS, in the case of the EU-C&P and EU-Singapore RTAs, the market access and national treatment obligations only apply to committed sectors in the Schedule, and only insofar as they are not limited by reservations in that Schedule. In contrast to the integrated GATS

Commission, 'Countries and Regions: Andean Community' (2014) <http://ec.europa.eu/trade/policy/countries-and-regions/regions/andean-community/> accessed 24 July 2014.

Schedules, the EU's Schedules of specific commitments in the EU-C&P, EU-Singapore and EU-Georgia agreements are divided in several Annexes.

a. For the EU-C&P RTA, they are: (i) Annex VII Section B for establishment; (ii) Annex VIII Section B for cross-border trade in services; and (iii) Annex IX Appendix 1 Section B and Appendix 2 Section B for temporary presence of natural persons for business purposes.
b. In the case of the EU-Singapore RTA, the commitments are listed under Annex 8 in (i) Appendix 8-A-1 for cross-border supply of services; (ii) Appendix 8-A-2 for establishment; and (iii) Appendix 8-A-3 for key personnel, graduate trainees and business services sellers.
c. The specific commitments in the EU-Georgia DCFTA are listed in (i) Annex XIV-A for establishment; (ii) Annex XIV-B for cross-border supply of services; (iii) Annex XIV-C for key personnel, graduate trainees and business sellers; and (iv) Annex XIV-D for contractual services suppliers and independent professionals.

Furthermore, the Schedules in the selected RTAs also differ structurally from GATS. Aside from the column setting out the relevant sector, they contain one[70] and not three columns (market access, national treatment and additional commitments) as is the case for GATS. This approach may simplify the Schedule, and mitigate some uncertainty related to the application of Article XX:2 GATS. From the perspective of regulatory autonomy, this approach seems to preserve more policy space, as it would seem there is a presumption that the listed reservation applies to both market access and national treatment obligations in the case of uncertainty about the nature of the reservation. It would seem more difficult in this case, compared to the Article XX:2 GATS situation, for a complainant to argue that the limitation only applies to market access issues and not national treatment.

The situation differs in the case of the EU-Georgia DCFTA. The national treatment and MFN obligations for establishment apply to all services sectors within the scope of the chapter except for those situations covered by reservations in Annex XIV-A. In other words, for the first time in an EU RTA, and in contrast to the EU's practice of using positive listing, a negative list approach was followed.[71] This is also evident from the annex, as it differs from other Schedules by not being formatted in a column-type document. It merely contains a list of horizontal and sectoral

[70] In the case of the EU-Georgia DCFTA, the Schedules take the form of a list.

[71] The negative listing approach has been called the most important innovation in services chapters of RTAs because it *"forces states to take an inventory of their restrictions and make them transparent."* J Anthony VanDuzer, 'A Critical Look at the Prospects for Robust Rules for Services in Preferential Trading Agreements' (2012) 39 Legal Issues of Economic Integration 29, 35.

limitations. These limitations do not distinguish *per se* between national treatment and MFN. For regulatory autonomy, the negative listing approach means that any unlisted services are subject to the non-discrimination provisions, as are new services. The degree of liberalisation is therefore higher, although it may be said that legal certainty is increased as well. Interestingly, the DCFTA contains no market access obligation for this mode of supply. In the absence of such a market access obligation, for which a violation does not require the demonstration of discrimination, this approach may be more deferent to regulatory autonomy. A government is allowed to regulate as it pleases, insofar that it does not discriminate either between different foreign, or between foreign and domestic, services or services suppliers. For cross-border supply of services such an obligation has been added, but no MFN obligation applies. The national treatment and market access obligations only apply to scheduled sectors, consequently following a positive listing approach, and are limited by the reservations in Annex XIV-B. This annex does follow the traditional EU Schedule form with two columns.

The domestic regulation provisions in Articles 93-95 mirror the division between the modes of supply. For cross-border supply of services, the obligation applies only to scheduled sectors and only to the extent that these specific commitments apply in accordance with Annex XIV-B. In the case of establishment and temporary stay of natural persons, the disciplines on domestic regulation shall not apply to sectors to the extent that a reservation is listed in accordance with Annexes XIV-A, C and D.

3. Conclusion

In conclusion, the scope of application of the most relevant obligations in the services chapters of the EU-Colombia & Peru and EU-Singapore RTAs is limited to services listed in the Schedule. In comparison to GATS, there are no core unconditional obligations (aside from e.g. the transparency obligation in Articles 130 EU-C&P and 8.17 EU-Singapore RTA). The lack of an MFN obligation and list of exemptions thereto, make the structure of the chapter more comprehensible. The structure of the services chapter in the EU-Georgia DCFTA thus differs substantially from that of GATS and of the other EU RTAs. It is a hybrid positive-negative listing chapter, with several flexibilities typical of trade in services. However, the hybrid approach in combination with the mode-specific obligations creates a complex structure that does not seem to offer greater flexibility.

C. THE SCOPE OF THE SELECTED EU RTAS FOR TRADE IN SERVICES

The scope of the services chapters of the selected EU RTAs differs from that of GATS. This is unsurprising considering the greater possibility of excluding specific services sectors in bilateral talks compared to multilateral negotiations. Hence, although the scope of the services chapters in the selected EU RTAs remains very broad, it is nonetheless more limited than the scope of GATS.

1. A wider scope

The scope of the services chapters of the selected EU RTAs is defined similarly to that of GATS, but with distinct differences. In comparison to GATS, the emphasis lies on a differentiation based on the modes of supply, and, as a result hereof, the term 'affecting' and its alternatives.

1.1 'Services' and 'supply of services'

Articles 108 EU-C&P and 77.12 EU-Georgia, which are carbon copies of Article I:3 (b) GATS, describe 'services' as any service in any sector, except services supplied in the exercise of governmental authority. Similarly, 'supply of a service', described in Article 108 EU-C&P in the exact terms of Article XXVIII (b) GATS, includes the production, distribution, marketing, sale and delivery of a service. The EU-Singapore RTA contains no such description of services, although the definition of 'supply of a service' is included in Article 8.2 (j).

1.2 Modes of supply

1.2.1 Establishment

A crucial formal difference between the selected EU RTAs and GATS is the approach to modes of supply of services.[72] Articles 110 EU-C&P and 77.9 (a) EU-Georgia define 'establishment' as any type of business or professional establishment in any productive economic activity relating to the production of goods and supply of services through (i) the constitution, acquisition or maintenance of a juridical person (including capital participation for lasting economic links); or

[72] Although Article 8.2 (m) EU-Singapore RTA substantively replicates Article I:2 GATS in explaining the modes of supply, it's chapter on cross-border trade in services nonetheless covers both Modes 1 and 2, as noted in Article 8.4 of the RTA.

(ii) the creation or maintenance of a branch or representative office for the purpose of performing an economic activity.[73] This definition would be wider than that of GATS Mode 3, i.e. commercial presence. Under GATS, the purpose of the establishment must be the supply of a service. GATS only applies to measures affecting trade in services whilst Article 111 EU-C&P applies to all measures affecting establishment.[74] Additionally, the title under which the chapter falls is titled 'Trade in services, establishment and electronic commerce', indicating trade in services does not completely cover establishment.[75] This wider scope also explains why the definitions in the EU-C&P RTA and EU-Georgia DCFTA do not explicitly refer to Mode 3. As is the case in GATS, the disciplines cover both pre- and post-establishment phases,[76] and include services originating in the territory of establishment but delivered in the territory of another Member. From the perspective of regulatory autonomy, this approach can perhaps be criticised. The scope of the chapter on establishment may have an impact that is unexpected considering the commonplace equivalence of the terms 'Mode 3', 'commercial presence' and 'establishment' in the context of trade in services.

Additionally, Article 77.9 (b) EU-Georgia adds that establishment also includes the right of natural persons to pursue economic activities as self-employed persons or by setting up undertakings which they effectively control. This addition further widens the scope of the establishment provisions in the agreement in two ways. First, including economic activities pursued by self-employed persons partially broadens the scope to services covered by GATS Mode 4. The overlap with the RTA alternative to Mode 4, i.e. temporary presence of natural persons for business purposes, is limited because, as addressed below, the latter is limited to specific categories of natural persons. This approach is coherent with the right of establishment in EU law as provided for in Article 49 of the Treaty on Functioning of the European Union (TFEU). Second, the explicit inclusion of undertakings set up and controlled by natural persons in the definition of establishment points at the difficulties in differentiating between Modes 3 and

[73] As per Articles 110 EU-C&P and 77.10 EU-Georgia, the term 'economic activity' does not include *"activities carried out in the exercise of governmental authority"*.

[74] 'Measures of a Party affecting establishment' is explicitly defined as including *"measures with respect to all activities covered by the definition of establishment"*, thereby carefully avoiding limiting the scope to GATS Mode 3.

[75] The scope of establishment in the RTA perhaps resembles more the scope of Articles 49 read together with 54 TFEU on the right of establishment, insofar applicable to legal persons.

[76] Sauvé and Ward, *The EC-CARIFORUM Economic Partnership Agreement: Assessing the Outcome on Services and Investment* 12.

4: commercial presence often requires the presence of natural persons.[77] In this case, it would seem that the entry of a natural person into a market, even with the intention of setting up an undertaking, precedes the setting up of the business. However, this situation would not be covered by GATS Mode 4, as it is more likely to be a matter of migration: at the moment of the crossing of the border, there is no 'international' service supply.[78] Hence, it is submitted that GATS would not apply. (Additionally, the temporary nature of Mode 4 services supply would exclude this situation from its scope.) If the natural person moves back abroad and remains in control from outside the business' location, the situation may be covered by GATS Mode 3, but probably only in a post-establishment phase. In the DCFTA, this situation is covered by the chapter on establishment. Lastly, and this applies to both aspects, the DCFTA goes further as it is not limited to the supply of services but includes any type of economic activity.

Although, at first sight, an almost identical approach is followed in the EU-Singapore RTA, Article 8.8 (d) notes that the economic activity should include, but not be limited to, supplying a service. This qualification limits the scope of the chapter on establishment in comparison to that of the EU-C&P RTA. Indeed, the scope is—albeit through the use of different wording—*de facto* identical to that of GATS Mode 3 as a result of this requirement.

1.2.2 Cross-border trade in services

Articles 117 EU-C&P, 8.4 EU-Singapore and 77.14 EU-Georgia define cross-border supply of services as encompassing both Mode 1 and Mode 2 supply of services. Although no explicit reference to GATS is made, the introduction of these terms through the use of the terms 'Mode 1' or 'Mode I' clearly indicates an intent to interpret this as GATS Modes 1 and 2, as defined in Article I:2 (a) and (b) GATS. Combining these two modes of supply into one is perhaps unsurprising , as difficulties have arisen in GATS scholarship when trying to distinguish between Modes 1 and 2.[79]

[77] Diana Zacharias, 'Article I GATS' in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), *Max Planck Commentaries on World Trade Law: WTO - Trade in Services*, vol 6 (Martinus Nijhoff 2008) 53.

[78] Paragraph 1 of the GATS Annex on Movement of Natural Persons Supplying Services under the Agreement notes that it applies to measures affecting natural persons who are service suppliers of a Member in respect of the supply of a service. The latter condition would not be fulfilled in the example at hand.

[79] This has led to the suggestion that both modes are to be read as one, or redefine Mode 2 so that it requires physical movement by the consumer. Zacharias, 'Article I GATS' 51.

1.2.3 Temporary presence of natural persons for business purposes

The RTA alternative to GATS Mode 4 is 'temporary presence of natural persons for business purposes'. The definitions applied to this mode of supply of services are very specific, setting out requirements for various categories of service suppliers to which the obligations apply. In the case of the EU-Colombia & Peru RTA and the EU-Georgia DCFTA, these are key personnel, graduate trainees, business service sellers, contractual service suppliers, independent professionals and short term visitors for business purposes. Definitions for these categories are inscribed in Articles 123 EU-C&P, 8.13 EU-Singapore and 88 EU-Georgia, corresponding largely with the definitions for Mode 4 in the EU's GATS Schedule. The maximum duration of the stay of the natural person depends on the category. For example, graduate trainees for ICT from Colombia or Peru may remain in the EU for up to three years. This limited scope reflects the EU's intention, as is also evident from its GATS commitments, to use Mode 4 primarily for highly-skilled workers.[80]

The obligations on temporary presence in the EU-C&P RTA only apply to listed sectors for contractual service suppliers, independent professionals and short term visitors for business purposes as listed respectively in Articles 126.2-3, 127.2-3 and 128.1 EU-C&P. In the EU-Georgia DCFTA, the obligations apply to sectors for which commitments (including reservations in separate Annexes) are made concerning establishment for key personnel and graduate trainees. For business sellers, commitments on cross-border service supply are also taken into account, again subject to specific reservations. A separate Schedule is provided for contractual service suppliers. In Articles 8.13-8.15 EU-Singapore, only (i) key personnel and graduate trainees and (ii) business service sellers are covered. The definitions of these categories are again specific, and are limited to sectors for which specific commitments on establishment (both categories (i) and (ii)) or cross-border supply of services (only category (ii)) are undertaken.

1.2.4 Measures 'adopted or maintained by a Party', 'affecting' and 'concerning'

A 'measure' in the context of the services chapters includes any measure by a Party in any kind of form.[81] Articles 108 EU-C&P, 8.2 (f) EU-Singapore and 77.2 EU-Georgia reproduce Article I:3

[80] See, for a comparative analysis of EU Mode 4 commitments in GATS and selected RTAs, Arpita Mukherjee and Tanu M Goyal, *Examining Mode 4 Commitments in India and the EU's Agreements: Implication for the India-EU BTIA* (Indian Institute of Management Bangalore Working Paper 396, 2013).

[81] Article 108 EU-Colombia & Peru RTA is identical to Article XXVIII (a) GATS.

(a) GATS in comprising measures from central, regional and local governments and authorities and non-governmental bodies in the exercise of powers delegated by such governments and authorities. Articles 118 EU-C&P, 8.3 EU-Singapore and 83 EU-Georgia mirror GATS, as these provisions apply to measures of the parties 'affecting' cross-border service supply. Affecting should be interpreted identically here to Article I:1 GATS. Whereas GATS only refers to measures 'by' Members, Articles 111 EU-C&P, 8.9 EU-Singapore and 78 EU-Georgia on establishment apply to measures that are 'adopted or maintained', highlighting that the RTA disciplines are not merely standstill provisions. The practical consequence of this wording is limited, as the key GATS disciplines also apply to existing measures.[82] Nonetheless, in combination with the potentially wide scope of the establishment chapters, as discussed in the previous section, this contributes to the forceful language of the establishment disciplines. Lastly, according to Articles 122 EU-C&P, 8.13 EU-Singapore and 88.1 EU-Georgia, all measures of a party 'concerning' entry and temporary stay of the specific categories of natural persons are excluded. The use of the term 'concerning' instead of 'affecting' would indicate a broader scope of these provisions.[83] Considering the already broad interpretation granted to 'affecting', it would seem defendable that even measures which, in principle, affect other modes of supply could also concern the entry and temporary stay of natural persons. For example, a measure that restricts cross-border trade in services may incentivise natural persons to cross the border in order to supply a service. Again, the scope of application is, as concerns this term, broader than under GATS.

2. Exemptions from the scope

2.1 Exemptions applicable to all modes of supply

The chapters on trade in services and establishment are limited by several explicit exemptions:

a. Articles 107.2 EU-C&P, 8.2 (d) EU-Singapore and 76.2 EU-Georgia exclude government procurement of services. Article 173 EU-C&P, 10.2 EU-Singapore and 142 EU-Georgia,

[82] E.g. Article II GATS applies to *"any measure covered by this Agreement"* as does Article XVII GATS, whilst Article XVI GATS explicitly states that it applies to measures which a Member adopts or maintains. Article VI:5 GATS is an exception to this rule, as it only applies to licensing and qualification requirements and technical standards *"that could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made."*

[83] Angus Stevenson (ed) *Oxford Dictionary of English (Online Version)* (Oxford University Press 2014), where 'to concern' is defined among others as *"to have relation or reference to; to refer to, relate to; to be about."*

which set out the scope of the respective chapters on government procurement, do however include trade in services;

b. Articles 107.3 EU-C&P, 8.2 (a) EU-Singapore and 76.3 EU-Georgia exclude subsidies or grants, including government-supported loans, guarantees and insurance. This exemption is notable considering the application of GATS to subsidies as measures affecting trade in services, insofar as specific commitments have been scheduled and no limitations are inscribed. This stresses the importance of subsidies as a policy instrument,[84] including the use of discriminatory subsidies;[85]

c. Articles 107.4 read together with 108 EU-C&P, 8.2 (b) EU-Singapore and 77.12-13 exclude services supplied in the exercise of governmental authority. The same conditions apply as under Article I:3 (c) GATS to establish governmental authority.[86] Considering the identical wording, it is submitted that the interpretation of the governmental authority exception in the RTAs should be identical to the one proposed in the context of Article I:2 GATS.

   Annex VII Section B of the EU-C&P RTA, Appendix 8-A-2 of the EU-Singapore RTA and Annex XIV-A of the EU-Georgia DCFTA contain a public utilities limitation for establishment, which reads that *"*[e]*conomic activities considered as public utilities at a national or local level may be subject to public monopolies or to exclusive rights granted to private operators."* Interpretative footnote 6 to Appendix 8-A-2 EU-Singapore states that :

   > *"Given that public utilities often also exist at the sub-central level, detailed and exhaustive sector-specific listing is not practical. To facilitate comprehension, specific footnotes in this list of commitments will indicate in*

[84] This is also evident from the EU GATS Schedule, in which a horizontal Mode 3 national treatment limitation for subsidies is included. The limitation holds that eligibility for subsidies from the may be limited to juridical persons established within the territory of a Member State. Public sector services may be subsidised, and no commitment is undertaken for subsidies relating to research and development. For Mode 4, subsidies may be reserved for nationals of an EU Member State. EU 2006 consolidated Schedule 15-17.

[85] Discriminatory subsidies are to be preferred over e.g. entry restrictions for foreign services and service suppliers because they can be better targeted. Brian Copeland and Aaditya Mattoo, 'The Basic Economics of Services Trade' in Aaditya Mattoo, Robert M Stern and Gianni Zanini (eds), *A Handbook of International Trade in Services* (Oxford University Press 2008) 116.

[86] Annex XI to the EU-C&P RTA contains an Understanding concerning subparagraph (b) of the definition of 'services supplied in the exercise of governmental authority'. The Understanding only applies between the EU and Peru, and only relates to the definition of the governmental authority exception insofar it applies to financial services. This Annex does not indicate that a different interpretation of the 'general' governmental authority exception is required. Article 10.1 (p) EU-Singapore, establishing the definition of 'privatised' in the chapter on government procurement, equally mentions governmental authority without informing a different interpretation.

an illustrative and non-exhaustive way those sectors where public utilities play a major role."

Footnote 201 to Annex VII Section B of the EU-C&P RTA includes an identical footnote to the latter, as does footnote 8 to Annex XIV-A of the EU-Georgia DCFTA.

In the case of the EU-Singapore RTA, as is the case under GATS, the public utilities limitation does not apply to telecommunications and computer and related services according to footnote 7. This is replicated in footnote 8 to Annex XIV-A of the EU-Georgia DCFTA, which is more elaborate and identical to the EU's GATS limitation on public utilities. Hence, the public utilities limitation in the EU-C&P RTA is wider than that under GATS or under the EU-Singapore and EU-Georgia agreements, as it may also apply to telecommunications and computer and related services;

d. Articles 107.6 EU-C&P, 8.4 EU-Singapore and 76.5 EU-Georgia exclude measures affecting natural persons seeking access to the employment market of a party and measures regarding citizenship, residence or permanent employment, again as is the case under GATS.

These horizontal exclusions are generally reminiscent of GATS, although the exclusion of subsidies and grants is an important novelty from the perspective of regulatory autonomy. This exclusion may be considered exemplary in the sense that it preserves regulatory autonomy to a considerable extent, without compromising on legal certainty and transparency vis-à-vis other parties, and, as noted, on efficiency.

2.2 Specific exemptions per mode of supply

Articles 111 (a)-(f) EU-C&P, 8.9 EU-Singapore and 78 EU-Georgia exempt several specific services sectors from the scope of the provisions on establishment, for example audio-visual services or services related to toxic waste. Articles 118 (a)-(c) EU-C&P, 8.3 EU-Singapore and 83 EU-Georgia contain fewer exemptions for cross-border trade in services (but those listed are substantively identical to the exemptions on establishment). In comparison to GATS, bilateral agreements need only cater for the interests of the signatory parties. Hence, there is more potential to agree on excluding specific services from the scope of the agreement. In the case of GATS, a practically similar result could be achieved by not scheduling specific commitments and inscribing MFN exemptions (as the EU has done for audio-visual services, for example). The exclusion of specific services from the scope nonetheless provides greater legal certainty

and does not subject the services to any obligation at all—which is, as explained, not the case for GATS, where certain obligations apply unconditionally.

From the perspective of regulatory autonomy, the importance of these exclusions is less systemically relevant than the horizontal exemptions. However, the EU's ability to negotiate these exemptions in a bilateral context in which GATS+ (i.e. obligations found in GATS but going further than the GATS counterpart) obligations arise, is important as it allows (relatively) specific defensive interests to be addressed. As noted, the benefit is legal certainty. The clear disadvantage is a less comprehensive scope, especially vis-à-vis obligations which are useful for trade liberalisation purposes but are less intrusive upon regulatory autonomy. It would appear that the fragmentation in the international regulation of trade in services, which results from exempting specific services sectors, is to be discouraged for two reasons. First, the interests which lead to the exclusion of specific services may change over time, but the exemptions may not be renegotiated easily. Second, although specific situations may justify exemption, in most cases regulatory autonomy should be sufficiently preserved through the horizontal exemptions. For example, the goals of the 'cultural exception' for audio-visual services, i.e. the preservation of cultural pluralism, may well be achieved without excluding these services from the scope of the services chapters.[87]

D. UNCONDITIONAL OBLIGATIONS IN THE SELECTED EU RTAS

1. No unconditional Most-Favoured-Nation obligation

The services chapters of the EU-C&P and EU-Singapore RTAs do not contain MFN obligations. Conversely, the EU-Georgia DCFTA does contain an MFN obligation in Article 79.2, which also contains a national treatment obligation. The obligation only applies to establishment. As noted, in contrast to general EU practice, the provisions on establishment in this agreement apply to commitments made on the basis of a negative list and therefore are not unconditional, contrary to the case under GATS. Its constraints on regulatory autonomy will therefore not be addressed in this report.

[87] See Bregt Natens, 'Chronicle of a Death Foretold? The Cultural Exception for Audio-Visual Services in EU Trade Negotiations' (2014) 41 Legal Issues of Economic Integration 367.

2. All transparency obligations are unconditional

Rather unsurprisingly considering its purpose, the principle of transparency is equally present, in rather similar ways as compared to GATS, in the selected EU RTAs and their services chapters. In the preamble of the EU-Singapore RTA, the parties recognise *"the importance of transparency in international trade to the benefit of all stakeholders."* This consideration is reminiscent of the GATS preamble in the sense that it combines the principle of transparency with the preamble's inclusionary wording (*"as a means of promoting the economic growth of all trading partners and the development of developing countries"*). Additionally, Chapter 14 of this RTA solely addresses transparency. In contrast to its explicit position in the preamble of the EU-Singapore RTA, the principle of transparency is not expressed in the preambles or objectives of the EU-C&P and EU-Georgia agreements. This does not mean that transparency is not considered important. Title X of the EU-C&P RTA contains provisions relating to transparency and administrative proceedings. Moreover, Article 287 EU-C&P contains a general obligation to cooperate in relevant bilateral and multilateral fora in order to increase transparency in trade-related matters.[88] In the EU-Georgia DCFTA, Chapter 12 is wholly dedicated to transparency.

All transparency obligations in the selected EU RTAs apply unconditionally. In many cases, their application extends beyond trade in services. The three prongs of the principle of transparency as discussed in the previous report—i.e. requirements (i) to make information on trade related laws, regulations and policies publicly available; (ii) to notify (changes to) laws and regulations; and (iii) to ensure that laws and regulations are administered in a uniform, impartial and reasonable manner—can also be applied to the provisions of the RTAs. As was the case with GATS, obligations that are part of the third prong have the most potential to constrain regulatory autonomy. Their unconditional nature amplifies such potential.

2.1 The obligation to publish or make publicly available all relevant measures

Although very similar to Article III:1-2 GATS, Articles 288.1 and 3 EU-C&P differ slightly from their GATS counterpart. The obligation under the RTA also requires prompt publication of all measures of general application relating to any matter covered by the agreement. Appropriate

[88] Article 116 EU-C&P requires the parties to cooperate in order to promote "an environment attractive for reciprocal investment", which includes the review of the investment legal framework, the investment environment and the flow of investments between the parties within five years of the entry into force of the RTA and at regular intervals thereafter. The language of this provision, heavily referring to investment rather than establishment as a mode of supply of services, is not surprising considering the scope of the establishment chapter in which it is listed.

notification to the WTO or publication on the party's website fulfils the obligation. However, the obligation may equally be satisfied by making these measures available to interested persons only. Under the GATS regime, this is only the case if publication is not practicable. This does not necessarily require making the measures publicly available. Article 221.1 EU-Georgia, entitled 'Publication' and part of the title on trade, requires parties to make all relevant measures of general application promptly and readily available via an officially designated medium. Although the provision does not explicitly state the measure should be published, the addition of the phrase *"in such a manner as to enable* any *person to become acquainted with them"* (emphasis added) implies that publication would be required. In contrast, Article 14.3.1 EU-Singapore, identical for the rest of the provision and also applicable to all of the agreement, states that *interested* persons and the other party should be able to become acquainted with the measures. In this case, it is argued that the obligation may be satisfied without public availability.

The latter two RTAs contain some additional transparency requirements. Articles 221.1 (c) EU-Georgia and 14.1 (c) EU-Singapore require sufficient time between publication and entry into force of such measures. Articles 221.2 EU-Georgia and 14.3.2 EU-Singapore asks parties to endeavour to publish in advance proposals for, or for amendments to, such measures of general application. For the former agreement, an exception to the latter obligations applies for duly justified cases including security or emergency issues. In the case of the latter, an exception applies whenever the measure is urgent.

The obligations in all three RTAs are similar. The added requirements in the EU-Georgia and EU-Singapore agreements could raise issues, but these do not seem related to regulatory autonomy. Therefore, none of these obligations to publish or make publicly available all relevant measures of general application constrain regulatory autonomy in a foreseeable manner.

2.2 The obligations to respond to information requests and establish enquiry and contact points

Again, in a very similar sense to Article III:4 GATS, Article 130.1 (a) EU-C&P requires the parties to respond promptly to all requests by another party for specific information regarding any of its measures of general application or international agreements which relate to or affect trade in services, establishment and electronic commerce.[89] Subparagraph (b) obliges parties to

[89] This is confirmed more generally in Article 290 EU-C&P.

establish one or more enquiry points to provide specific information to investors and services suppliers of another party, upon request, on all matters referred to in subparagraph (a). The enquiry points need not be depositories of laws and regulations and are listed in Annex X (Enquiry Points Regarding Trade in Services, Establishment and Electronic Commerce), which contains the address of the enquiry points in all EU Member States and for the designated section in the European Commission.

Article 97.1 EU-Georgia contains the same obligation, although it applies generally to all matters pertaining to the agreement and the enquiry points only need to be notified to the other party. Article 222 of the agreement provides that contact points, which should respond to enquiries for information, need to be designated. The information granted by the contact point on any measure of general application that might affect the operation of the Title IV on trade is not legally binding, but the information must be provided promptly upon the request of a party.

For the EU-Singapore RTA, Article 8.17 equally obliges the parties to respond promptly to requests for specific information on any measure of general application pertaining to trade in services and establishment. This article, part of the services chapter, also refers to Article 14.4, which is a more elaborate provision on enquiries and contact points. Its key elements are twofold. First, it requires the prompt provision of information and response to questions related to actual or proposed measures of general application that may affect the operation of the RTA, regardless of prior notification of the measure. The information is not legally binding and without prejudice to the consistency of the measure with the RTA. Second, the parties must establish or maintain appropriate mechanisms with the task of seeking to resolve problems effectively for interested persons of the other party. This applies to any problem that may arise from the application of a measure of general application. Notably, these processes should be easily accessible, time-bound, result-oriented and transparent.

Although the obligations can be burdensome, especially as concerns the more detailed provisions in the EU-Singapore RTA, they cannot be said to restrict regulatory autonomy. The last-noted obligation can be said to be similar to the obligation to make available legal remedies, discussed next.

2.3 The obligations to make available legal remedies

Articles 292 EU-C&P, 14.6 EU-Singapore and 224 EU-Georgia require the establishment or maintenance of judicial, quasi-judicial or administrative tribunals or procedures for the purpose of the prompt review of trade-related administrative action. They are similar to the obligation to make available legal remedies in Article VI:2 GATS,[90] although some differences in language are notable. Most importantly, instead of requiring potential remedies, Article 292 EU-C&P requires the tribunals or procedures to have the power to correct the administrative action. Article 14.6 EU-Singapore contains the same obligation but qualifies that the establishment or maintenance of the tribunals or procedures is subject to the party's domestic laws. Moreover, it explains in interpretative footnote 1 to that provision that 'correction' *"may include a referral back to the body that took such action for corrective action"*. Again, these requirements seem unlikely to constrain regulatory autonomy. The provisions in all three agreements contain procedural requirements for the tribunals and procedures, for example related to the right of defence or the implementation of decisions.

In addition to the obligation to make available legal remedies, Article 411 EU-Georgia, which is a stand-alone provision in the final chapter of the title on trade, also requires the parties to ensure that natural and legal persons of the other party have non-discriminatory access vis-à-vis the party's own nationals to the domestic competent courts and administrative organs to defend their individual rights. The EU-C&P and EU-Singapore RTAs do not contain a similar provision. This obligation appears to guarantee standing for Georgian complainants before European and Member States' courts, insofar as such standing is granted to domestic complainants.

2.4 Transparency obligations related to recognition

Any agreement on mutual recognition that has been found consistent with the requirements set out by the RTA must, according to Articles 129.5 EU-C&P and 96.5 EU-Georgia, also be consistent with, in particular, Article VII GATS. Consequently, the transparency obligations of Article VII GATS analysed in the previous report of this research track are applicable to these RTAs *mutatis mutandis* (i.e. applicable in full, with the necessary textual changes to

[90] The unconditional nature of this obligation in the RTAs supports the position that the corresponding GATS provision is indeed not conditional.

accommodate for the different context).[91] Although the EU-Singapore RTA also contains a provision on mutual recognition for services, the agreement does not include a reference to Article VII GATS. Nonetheless, its transparency provisions would apply in any case: not fulfilling the information requirements of Article VII GATS would violate GATS because these obligations apply to bilateral relations. Of course, in such a case, no RTA provision would be violated. As noted with regard to GATS, these transparency obligations do not constrain regulatory autonomy.

2.5 The obligation to enter into consultations regarding competition matters

The consultation obligation for 'business practices' set out in Article IX:2 GATS is elaborated in Article 12.13 EU-Singapore. It is part of the RTA's Chapter 12 on 'Competition and related matters', and applies generally to matters concerning antitrust and mergers, public undertakings and undertakings entrusted with special or exclusive rights and state monopolies, confidentiality and cooperation, and coordination in law enforcement. The provision requires parties to (i) enter into consultations on any questions related to matters within the scope of the provision; and (ii) promptly discuss upon the request of the other party any questions related to the interpretation or application of Chapter 12. This provision is not a soft-consultations norm as found in Article IX GATS, but does not appear to constrain regulatory autonomy.

In contrast to the EU-Singapore RTA, Article 265 EU-C&P merely requires a party to accept the initiation of consultations on issues related to competition, whilst according its fullest consideration to the concerns of the other party. Interestingly, the provision explicitly adds that the autonomy of the party being asked to enter into consultations is 'fully maintained' as concerns its final decision on the issue subject to the consultations. This appears to be an unnecessary safeguard, as the provision does not indicate otherwise.

The EU-Georgia DCFTA does not contain a similar provision on consultations regarding competition matters.

[91] These three obligations are (i) informing the WTO of existing recognition measures; (ii) promptly informing the WTO as far in advance as possible of the opening of negotiations on such an agreement or arrangement; (iii) promptly informing the WTO when it adopts new recognition measures or significantly modifies existing ones.

2.6 Transparency obligations related to subsidies

As noted, Article XV GATS includes an obligation to exchange information regarding subsidies. Article 293.5 EU-C&P builds on this transparency provision, stating that the parties agree to exchange information upon the request of another party on matters regarding subsidies related to trade in services. As with Article XV GATS, the provision does not further specify the type of information that should be exchanged. Article 206 EU-Georgia, defining subsidies related to services with reference to the conditions set out in Articles 1 and 2 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement),[92] requires the prompt provision of information and response to questions pertaining to particular subsidies relating to trade in services. Hence, while stronger in wording, the scope of the obligation is more limited as it does not require general information exchanges. Article 12.9 EU-Singapore goes further than both other agreements. It requires each party to report biannually to the other party by means of a publicly available website on the legal basis, form, and to the extent possible, amount or budget, and the recipient of subsidies, including subsidies related to trade in services, granted by its government or any public body.[93] Even in the case of the more stringent provisions in the EU-Singapore RTA, these obligations do not constrain regulatory autonomy (with the *caveat* noted above).

2.7 Reasonable, objective and impartial administration

All three RTAs contain an unconditional obligation similar to the conditional GATS obligation to administer measures of general application in a reasonable, objective and impartial manner. Article 131.1 EU-C&P is identical to Article VI:1 GATS, although it applies to all measures of general application covered by the title on trade in services, establishment and e-commerce as discussed above.

Article 223.1 EU-Georgia is again substantively identical to its GATS counterpart but its scope of application covers the integral Title IV on trade. Moreover, in paragraph 2 of that provision,

[92] This is a practical approach also used in Gilles Gauthier, Erin O'Brien and Susan Spencer, 'Déjà Vu, or New Beginning for Safeguards and Subsidies Rules in Services Trade?' in Pierre Sauvé and Robert M Stern (eds), *GATS 2000: New Directions in Services Trade Liberalization* (Brookings Institution 2000) 177.

[93] The EU-Singapore RTA also contains substantive disciplines applying to subsidies for service suppliers in Articles 12.5-12.10, which are discussed below. The same provision is listed in paragraph 3 of Article 206 EU-Georgia but applies solely to subsidies in relation to goods.

the obligation is further specified. These specific emanations require the parties, when applying measures of general application to particular services or service suppliers, to:

a. ensure that the procedures a party applies are based on and carried out in accordance with that party's law. This requirement gives foreign service suppliers the same guarantees as domestic service suppliers that domestic laws will be applied, although enforcement may be much simpler for domestic service suppliers (for example because of standing, or from a purely practical perspective);
b. in the case of the initiation of administrative proceedings, endeavour to provide directly affected interested persons with a reasonable notice, a description of the nature of the proceeding, a statement of the legal authority under which the proceeding is initiated and a general description of any issues in controversy;
c. afford such directly affected interested persons a reasonable opportunity to present facts and arguments before a final administrative action is undertaken, in so far as time, the nature of the proceeding and, notably, public interest will allow.

The relationship between these specific emanations and the general principles of reasonableness, objectivity and impartiality is not entirely clear. As the specific emanations are preceded by the words 'to this end' the general principles are to be understood as *not exclusively* furthered through these specific emanations. They are merely explicit examples of what is covered by this obligation.

Although Article 14.5 EU-Singapore strongly resembles Article 223 EU-Georgia from a substantive point of view, its structure is fundamentally different. The three specific emanations are also present in the former provision, in identical wording. However, instead of a general first paragraph that sets out the obligation to administer all measures of general application in an objective, impartial and reasonable manner, Article 14.5 EU-Singapore merely states that with a view of doing so, the three specified conditions must be fulfilled. Hence, it is argued that in contrast to the case under the EU-Georgia DCFTA, here the general principles of objectivity, impartiality and reasonableness are the objective of the three specified conditions, and do not contain an obligation in and of themselves. Consequently, the obligation is, perhaps surprisingly, more limited than is the case for the EU-C&P RTA and the EU-Georgia DCFTA. It could even be said to be GATS-.

Nonetheless, the provisions in all three RTAs do not constrain regulatory autonomy beyond the potential constraints from Article VI:1 GATS, and the interpretation of the three principles set forth in our analysis of the latter provision applies to these provisions *mutatis mutandis*.

2.8 Information obligations related to authorisation for the supply of services

Article 131.2 EU-C&P is identical to Article VI:3 GATS, but applies to the services and service suppliers covered by the wider definition of establishment in the agreement insofar as specific commitments have been scheduled and where authorisation is required. It is thus unconditional, in contrast to Article VI:3 GATS. Nonetheless, the obligation does not constrain regulatory autonomy.

No parallel general obligation related to such authorisation can be found in the EU-Singapore RTA or the EU-Georgia DCFTA. These agreements do contain more elaborate provisions on authorisation in the specific context of licencing requirements and procedures and qualification requirements and procedures, discussed below.

2.9 No requirement of adequate procedures to verify professional service suppliers' competence

There is no alternative to Article VI:6 GATS in any of the RTAs. In the EU-Singapore and EU-Georgia agreements, the competence of natural persons, not explicitly limited to professional service suppliers, is linked to qualification requirements, discussed below.

2.10 The obligation to provide an explanation of the objective and rationale for measures of general application, and to provide opportunities for comment

Articles 14.3 EU-Singapore and 221 EU-Georgia contain a 'GATS-X' (i.e. an obligation not found in GATS but nonetheless related or applicable to trade in services) transparency obligation. These provisions require that Members provide an explanation of the objective of and the rationale for measures of general application.[94] In the EU-Singapore RTA, this requirement only applies 'to the extent possible'. It is argued that these conditions would be fulfilled in many cases by way of preambular considerations or general provisions in such

[94] This obligation is reminiscent of, but differs from, Articles 2.5 and 2.9.2 TBT Agreement, and Paragraph 5 (b) of Annex B to the SPS Agreement..

measures of general application. Although its impact on regulatory autonomy is very limited because the objective and rationale of the measure themselves are of course not subject to requirements, this provision is nonetheless notable as it arguably externalises a form of procedural good governance.

The EU-C&P RTA does not contain a similar provision. The closest it comes is in Article 288.2, which requires that each party, to the extent possible, shall provide opportunities for interested persons to comment on any proposed measure relating to any matter covered by the agreement, and shall examine such comments, provided they are relevant. This provision can also be found in Articles 221.2 (b)-(c) EU-Georgia and 14.3.2 (b)-(c) EU-Singapore.[95] Again, such requirements do not constrain regulatory autonomy.

3. One unconditional domestic regulation obligation

In contrast to the case in Article VI:4-5 GATS and Articles 8.18-8.20 EU-Singapore and 93-95 EU-Georgia, Article 131 EU-C&P on domestic regulation applies to all sectors, regardless of whether they are scheduled or not. However, the interpretation of this provision, which is substantively very similar to the aforementioned GATS provisions, is so dependent on that under GATS that it's constraints on regulatory autonomy will not be addressed in this report.

4. Obligations related to monopolies and exclusive service suppliers

4.1 Competition-related obligations

The services and establishment chapters of the EU-C&P, EU-Singapore and EU-Georgia RTAs do not contain specific obligations for monopolies or exclusive service suppliers. However, their respective Title VIII, Chapter 12 and Chapter 10 on competition do. The disciplines in these chapters apply to goods and services.

In Article 263 EU-C&P, it is explicitly noted that nothing in the agreement shall prevent a party from establishing or maintaining public or private monopolies and state enterprises according to its domestic legislation. The terms public and private monopolies do not appear to include

[95] This obligation, too, is similar to those contained in Articles 2.9.1 and 2.9.4 TBT Agreement, and Paragraphs 5 (a) and (d) of Annex B to the SPS Agreement.

exclusive service suppliers because of the addition of the term 'state enterprises'. In the context of Article XVII GATT 1994, state (trading) enterprises are defined as

> *"governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports."*[96]

Paragraph 1(a) of the Ad Article XVII GATT 1994, in Annex 1 of the GATT 1994, further specifies that:

> *"Governmental measures imposed to insure standards of quality and efficiency in the operation of external trade, or privileges granted for the exploitation of national natural resources but which do not empower the government to exercise control over the trading activities of the enterprise in question, do not constitute "exclusive or special privileges"."*

The application of this provision to goods implies that this definition can be applied *a fortiori* in the context of the EU-C&P RTA. Therefore, state enterprises would include exclusive service suppliers, both established or authorised by the government.[97]

The parties must ensure that these companies are subject to its domestic competition laws. The content of these laws is not further specified and may thus be moulded to fit with domestic policy preferences. Additionally, with regard to state enterprises and designated monopolies, no party shall adopt or maintain any measure, contrary to the provisions of the competition title, which distorts trade and investment between the parties. Considering that these provisions mainly refer to the domestic competition laws, they do not constrain regulatory autonomy.

In Article 205 EU-Georgia, it is again noted that the agreement does not prohibit the designating or maintaining of state monopolies or state enterprises, or entrusting enterprises with special or exclusive rights according to its domestic legislation. Considering the aforementioned definition of state enterprises, it is unclear why the third category of enterprises was added to the provision. The most likely reason seems to be avoiding discussion as to whether private, i.e. non-governmental, enterprises are covered by the term 'state enterprises'.

[96] Understanding on the Interpretation of Article XVII of the GATT 1994, para. 2.

[97] Both the text of Article XVII GATT 1994 and the AB distinguish state trading enterprises from private enterprises: *Canada - Measures Relating to Exports of Wheat and Treatment of Imported Grain* WT/DS276/AB/R, AB report adopted 27 September 2004 para. 149. However, this distinction is, in our opinion, between private enterprises that have been granted special or exclusive rights and private enterprises that do not.

State monopolies of a commercial character, state enterprises or enterprises that have been granted special or exclusive rights have to be subject to domestic competition laws insofar as this does not inhibit them in performing their tasks. Although this qualification is absent from the EU-C&P RTA, the domestic legislation may of course include specific clauses which safeguard the effective working of these undertakings. Nonetheless, it is a notable explicit inclusion, perhaps motivated by existing competition laws that did not contain specific rules for the relevant undertakings. As under the EU-C&P RTA, these obligations cannot be said to constrain regulatory autonomy as domestic competition laws may cater for any policy needs. The explicit limitation that defends the effective performance of the covered undertakings serves as an additional, but perhaps legally unnecessary, safeguard.

The relevant disciplines in the EU-Singapore RTA are the most elaborate. Article 12.3 of the agreement once more notes that the agreement does not prevent a party from establishing or maintaining public undertakings, or entrusting undertakings with special or exclusive rights. State monopolies, further addressed in the subsequent article, are likely to fall within the scope of the term 'public undertakings', which would also encompass state enterprises. 'Public' exclusive service suppliers would do, too. Private monopolies or exclusive service suppliers would fall within the scope of the undertakings entrusted with special or exclusive rights. The scope of all three provisions is thus, although their wording differs, likely to be the same as concerns monopolies and exclusive services suppliers. The EU-Singapore RTA perhaps goes further, as all public undertakings, even if they have not been granted exclusive rights or privileges, are included. However, there may be few relevant public undertakings that do not fall within the scope of the term state enterprises.

Again, the covered undertakings (regardless of the commercial character of state monopolies) have to be subjected to certain competition laws,[98] insofar as this does not inhibit them in performing their tasks.[99]

Furthermore, the EU-Singapore RTA provides that parties must ensure that undertakings entrusted with special or exclusive rights (but not public undertakings) do not use those rights to engage in anticompetitive practices in a different market to the one in which their special or

[98] Articles 12.1 and 12.2 EU-Singapore further elaborate on which laws apply.
[99] Article 12.3.2 EU-Singapore.

exclusive rights apply.[100] The scope of the obligation is wide as it includes actions through those undertakings' dealings with their parents, subsidiaries, or other undertakings with common ownership. It is limited in the sense that the anticompetitive practices are only prohibited if they adversely affect investments or trade in goods or services of the other party. This obligation again mitigates one of the shortcomings of Article VIII:2 GATS, which does not apply to such anticompetitive cross-subsidisation.[101] The impact of this provision on regulatory autonomy is nonetheless limited in the same way as is the case in Article VIII GATS. It requires the adoption or maintenance of certain competition laws but would not preclude any policy, except for any policies aiming at anticompetitive cross-subsidisation.

4.2 A non-discrimination obligation for state monopolies

Article 12.4 EU-Singapore contains a specific obligation for state monopolies,[102] for which no counterpart is included in the EU-C&P or EU-Georgia agreements. It reaffirms that nothing in the competition chapter shall be construed to prevent a party from designating or maintaining state monopolies. In our view, this statement is redundant as, as noted, state monopolies are covered by Article 12.3.1 of the agreement as well. Subsequently, it contains the obligation to *"adjust state monopolies of a commercial character"* to ensure that no discrimination occurs in (i) the procurement of goods and services from natural or legal persons of the other party and (ii) the marketing of goods and services to natural or legal persons of the other party. The commercial character is present—in accordance with the interpretation of 'on a commercial basis' in the context of the governmental authority exception—when the state monopoly supplies goods or services with a profit or with a long-term profit-seeking intention. (Notably, the governmental authority exception does *not* apply to this chapter.)

Considering that the RTA includes government procurement disciplines that cover services, the first element of this obligation is not surprising.[103] It does not constrain regulatory autonomy, except for the fact that domestic suppliers can no longer benefit from the procurement of the state monopolies. The second element is however unexpected. This is especially so because

[100] Article 12.3.3 EU-Singapore.

[101] Aaditya Mattoo, *Dealing with Monopolies and State Enterprises: WTO Rules for Goods and Services* (World Trade Organization Trade in Services Division Staff Working Paper TISD9801, 1997) 21-22. Mattoo highlights that these concerns are not that different from predatory pricing issues in the context of the dumping of goods.

[102] Notably, Article 12.3.4 EU-Singapore contains an obligation that solely applies to Singapore for exclusive service suppliers. This obligation is similar to the one discussed here.

[103] It is however in contrast to Article VIII:1 GATS.

the ordinary meaning of the term 'marketing' based on a dictionary definition is wide. Marketing is the:

> *"aggregate of functions involved in transferring title and in moving goods from producer to consumer including among others buying, selling, storing, transporting, standardizing, financing, risk bearing and supplying market information."*[104]

State monopolies are thus subject to an unconditional national treatment-type non-discrimination obligation for their marketing of services to natural or legal persons of the other party. This marketing *to* natural or legal persons should be read as providing non-discriminatory *access* to the service that is being supplied by the commercial state monopoly. For example, a state postal service monopoly with a commercial character cannot discriminate in its supply of postal services between domestic and foreign consumers of these services.

This obligation is thus similar to Article VIII:1 GATS, although its scope is wider. First, it is not limited by specific commitments, limitations thereto or MFN exemptions. Second, it is not limited to the supply of the monopoly service. Third, the non-discrimination obligation is phrased in general terms, with a wider scope of application than the MFN or national treatment obligations under GATS. There is no requirement of less favourable treatment or a likeness condition. Therefore, its constraints on regulatory autonomy are more substantial. Nonetheless, these constraints remain limited as they only require governments to eliminate any discrimination from the supply of services by state monopolies with a commercial character.

4.3 The EU Schedules of specific commitments

As noted, there is no exclusion of monopoly or exclusive service suppliers from the scope of the services chapters of the EU RTAs, unless the governmental authority exception applies. Therefore, and taking into account the considerable attention devoted to the subject in the EU's GATS Schedule, the scope of the specific commitments in the EU's Schedules in the selected RTAs are important.

It is notable that the horizontal 'public utilities' limitation is also inscribed in Annexes VII Section B EU-C&P and 8-A-2 EU-Singapore, which cover limitations for establishment. Its scope is

[104] *United States - Tax Treatment for "Foreign Sales Corporations"* WT/DS108/AB/R, AB report adopted 20 March 2000 para. 129, referring to *United States - Tax Treatment for "Foreign Sales Corporations"* WT/DS108/R, Panel report adopted 20 March 2000 para. 7.154. The Panel cited Webster's Third International Dictionary, Vol. II. The AB concluded that, *in casu*, the dictionary definition left interpretive questions unresolved.

wider, as not only services but all economic activities may be covered.[105] The structure of the Schedule, in which market access and national treatment limitations are listed in the same column, makes recourse to an Article XXI:2 GATS-type provision unnecessary to extend the limitation from market access to national treatment. The Schedule also contains sectoral limitations. These limitations are fewer than in the GATS Schedule, but all of the EU's sectoral limitations in the EU-C&P and EU-Singapore RTAs are also scheduled under GATS. An exception, in both RTAs, is the maintenance and repair of rail transport equipment in Latvia, which is supplied by a state monopoly. For the EU-Singapore RTA, there are additional reservations for the distribution of pharmaceutical products and tobacco products, for pipeline transport for goods that are not fuel, and for passenger and freight transportation services in Austria, where exclusive rights and/or authorisations can only be granted to nationals or legal persons of the EU Member States. The latter limitation for passenger and freight transportation also applies to Bulgaria.

Annexes VIII Section B EU-C&P and 8-A-1 EU-Singapore contain the commitments and limitations thereto for cross-border trade in services. Paragraphs 3 and 4, respectively, of the introductory note to the Schedules note that the commitments are *"without prejudice to the existence of public monopolies and exclusive rights as described in the list of commitments on establishment*." The same applies to the 'Mode 4' specific commitments in paragraph 7 of the introductory note to Annex 8-A-3 EU-Singapore. The Schedules further replicate the Italian limitation for Mode 1 wholesale trade in tobacco services from the EU's GATS Schedule. A limitation not contained in the GATS Schedule applies to publicly funded research and development services on natural sciences and interdisciplinary research and development services. For these services, exclusive rights and/or authorisations can only be granted to EU nationals or juridical persons.[106]

As noted, the EU's Schedule for establishment, contained in Annex XIV-A of the EU-Georgia DCFTA makes use of a negative list. The 'public utilities' exemption is replicated. This Annex further repeats the reservation for research and development services, although here it applies to all such services. The French limitation on tobacco retail also applies. A limitation not found in

[105] The exact limitation reads: *"Economic activities considered as public utilities at a national or local level may be subject to public monopolies or to exclusive rights granted to private operators."*

[106] Under GATS, these rights may fall within the scope of the horizontal public utilities limitation for those EU Member States which have scheduled specific commitments for the relevant research and development services. Those Member States are Austria, Estonia, Latvia (only for natural sciences), Hungary and Slovenia.

GATS or the other RTAs allows Austria and Bulgaria to grant exclusive rights and/or authorisations only to nationals or legal persons of EU Member States for passenger and freight transportation services.

For cross-border trade in services, a positive list is used (as is the case in GATS). In this regard, Annex XIV-B EU-Georgia again notes, in paragraph 4 of the introductory note, that the Schedule is without prejudice to the existence of public monopolies and exclusive rights as described in the list of commitments on establishment. (This is replicated for 'Mode 4' commitments in Annexes XIV paragraph 7 of the introductory note.) The publicly funded research and development limitation is listed for Modes 1 and 2, for social sciences, humanities and natural sciences.

The EU-Georgia DCFTA thus contains fewer limitations for monopolies and exclusive service suppliers, although the use of a negative list could perhaps have indicated that *more* limitations would need to be scheduled to accommodate for the negative listing. As a consequence, there is, especially as concerns establishment, but equally insofar as fewer limitations are scheduled for cross-border trade in services, less room for manoeuvring for governments to establish or maintain monopolies or exclusive service suppliers. For example, the state monopoly on tobacco retailing services in GATS and the EU-C&P and EU-Singapore RTAs for Spain, France and Italy cannot be upheld under the EU-Georgia DCFTA. In the latter agreement, it is merely noted that for distribution services in tobacco, nationality requirements may apply to operate as a tobacconist. Therefore, regulatory autonomy is constrained by more extensive commitments in the EU-Georgia DCFTA vis-à-vis GATS and the other two agreements.

5. Obligations related to the current and capital transactions

The provisions addressing current and capital transactions in the selected EU RTAs are not part of the services chapters, but apply generally to trade. In the EU-C&P RTA and EU-Georgia DCFTA, they form Title V and Chapter VII respectively, entitled Current Payments and Movement of Capital.[107] In the EU-Singapore RTA, two provisions address current and capital transactions.

[107] It may be noted that Article 171 EU-C&P requires the parties to consult with a view to facilitating the movement of capital between them.

For current transactions, Articles 168 EU-C&P and 17.7 EU-Singapore require the parties to authorise any payments and transfers on the current account of balance of payments between the parties, in freely convertible currency and in accordance with the provisions of Article VIII of the Articles of Agreement of the International Monetary Fund (IMF). This obligation is unconditional, contrary to Article XI GATS, and therefore has a more sweeping scope than the GATS counterpart. The use of the term 'authorise' indicates that the payment may need to be approved,[108] and thus is not automatic. This is notable considering prior EU practice, where the EU undertook the obligation to not 'impose' any restrictions on current payments for current transactions.[109] Similarly, in Article 137 EU-Georgia, the parties *"undertake to impose no restrictions and shall allow"* current transactions in freely convertible currency and in accordance with Article VIII of the IMF Articles of Agreement. This obligation goes further than the one in the EU-C&P and EU-Singapore RTAs.

Interestingly, as concerns capital transfers, the EU-Singapore agreement only contains a consultation obligation with a view to facilitating the movement of capital between the parties.[110] Articles 169 EU-C&P and 138.1 EU-Georgia however oblige the parties to ensure the free movement of capital transactions relating to investments and other transactions made in accordance with the provisions of, inter alia, the services chapter, including the liquidation and repatriation of such investments and of any profit stemming therefrom. The obligation also applies to transactions related to the financial account of the balance of payments. The obligation is limited because a link between the substantive provisions of the RTA and the capital transaction appears to remain necessary. For the EU-C&P RTA, it is further limited by footnote 57, which elucidates that the exceptions clauses of the RTA shall apply to this Title of the agreement as well.

The EU-Georgia DCFTA goes further, and adds in Article 138.2 that for transactions on the capital and financial account not covered by paragraph 1, each party shall ensure the free movement of capital (i) relating to credits for commercial transactions, (ii) for the provision of services in which a resident of one of the parties is participating, and (iii) relating to portfolio

[108] *United States - Certain Measures Affecting Imports of Poultry from China* WT/DS392/R, Panel report adopted 25 October 2010 para. 7.370, where it was noted that the U.S. Food Safety and Inspection Services *"is giving formal or official sanction (i.e. authorization) and thus approval of a country to export"* (footnote omitted) to the U.S.

[109] Samer Fares, 'Current Payments and Capital Movements in the EU-Mediterranean Association Agreements' (2003) 30 Legal Issues of Economic Integration 15, 18, referring to Article 27 EU-Palestine Interim Association Agreement, which does only apply to goods.

[110] Article 17.8 EU-Singapore.

investments, financial loans and credits by the investors of the other party. As a consequence, the link between the capital transaction and the agreement's substantive provisions is no longer required.

It is very difficult to evaluate the constraints on regulatory autonomy of these provisions without further in-depth analysis as to whether these concerns are not mitigated by specific financial services disciplines in the RTAs, by EU law or practice, and by the commitments that result from the IMF Articles of Agreement.[111] As noted by one author, the provisions *"lag behind the virtual free movement of capital and payments among parties* [*in casu* of the Association Agreements between the EU and Mediterranean countries]*."*[112] In comparison to GATS, it is notable that the relevant provisions in the selected RTAs are not conditional upon specific commitments but apply generally. For current transactions, this wider scope is mitigated in the EU-C&P and EU-Singapore RTAs as the EU may still require the authorisation of payments. In the EU-Georgia DCFTA, no restrictions may be imposed. Interestingly, the EU-Singapore RTA does not contain disciplines for capital transactions while the EU-C&P and EU-Georgia agreements' scope in this matter is extended to transactions on the financial account. Lastly, confirming that the EU-Georgia DCFTA has the most stringent disciplines at hand, this agreement also applies to capital transactions that are not linked to substantive provisions of the DCFTA.

6. Unconditional GATS-X disciplines

6.1 Competition

As noted, competition policy is one of the Singapore Issues:[113] limited competition and anti-competitive practices have the potential to distort the proper operation of markets and may undermine the benefits of trade liberalization arising from trade agreements.[114] Article IX is the only GATS provision addressing the issue. The EU has therefore addressed competition, including but not limited to trade in services, in its RTAs.

[111] See, for such an analysis, see Fares, 'Current Payments and Capital Movements in the EU-Mediterranean Association Agreements'.
[112] Ibid 32.
[113] WT/MIN(96)/DEC, Singapore Ministerial Declaration (Adopted 18 December 1996) para. 20.
[114] Articles 259.1 EU-C&P, 12.1.1 EU-Singapore and 203 EU-Georgia.

Articles 258-262 EU-C&P form Title VIII on competition policy. Notably, the parties may not have recourse to dispute settlement on the basis of these provisions.[115] The main obligation of the section is enshrined in Article 259.2 EU-C&P, which states the parties agree that three types of practices are inconsistent with the agreement insofar as they affect trade:

a. any agreement, decision, recommendation or concerted practice, which has the purpose or effect of impeding, restricting, or distorting competition in accordance with domestic competition law;
b. the abuse of a dominant position in accordance with domestic competition law; and
c. concentrations of companies which significantly impede effective competition in accordance with domestic competition law.

The parties must support and promote measures to strengthen competition in their respective jurisdictions in accordance with the objectives of the RTA. As concerns domestic competition law, Article 260 requires parties to (i) maintain competition laws and adopt appropriate actions; and (ii) maintain or establish competition authorities for the effective enforcement of the competition laws. It is expressly stressed that each party maintains its autonomy to establish, develop and implement its own competition policies. In case a party considers that any of the three aforementioned prohibited practices in the other party has an adverse effect on trade relations, it may request that enforcement activities established under the host country's domestic competition legislation are initiated.[116] Competition authorities must notify the other party's competition authorities of the enforcement of domestic competition law insofar that important interests of the other party are affected.[117]

Most obligations from the competition title in the EU-C&P do not constrain regulatory autonomy as they merely require the maintenance of certain existing competition laws and their effective application. The three types of practices in Article 259.2 EU-C&P may come closest to substantive obligations, but this concern is alleviated by the addition of *"in accordance with their respective competition laws"* to each. Moreover, from the perspective of *de facto* regulatory autonomy, Article 266 EU-C&P is relevant as it exempts these provisions from the scope of dispute settlement.

[115] Article 266 EU-C&P.
[116] Article 261.5 EU-C&P.
[117] Article 262 EU-C&P.

The competition provisions in the EU-Singapore and EU-Georgia RTAs can be found in Articles 12.1-12.2 and 203-204 respectively. As with the EU-C&P RTA, Articles 12.14 EU-Singapore and 207 EU-Georgia exempt these provisions from dispute settlement proceedings. The parties are required to maintain effective comprehensive legislation on specific competition related issues insofar as these affect trade. Again, it is expressly noted that the autonomy to develop and enforce such rules remains with the parties. Authorities able to implement the legislation effectively must be maintained, and the competition legislation must be applied in a transparent and non-discriminatory manner. The application of the legislation must also respect the principles of procedural fairness and rights of defence of the parties concerned, including the right of the parties concerned to be heard prior to deciding on a case.

As with Article VI:1 GATS, and Articles 223.1 EU-Georgia and 14.5 EU-Singapore, the obligation to *apply* legislation, *in casu* competition legislation, may raise regulatory autonomy concerns. The review of application may involve, in certain cases, substantive review. Most relevant is the requirement to apply the competition legislation in a non-discriminatory manner. This requirement goes substantially beyond the reasonable, impartial and objective standard of Article VI:1 GATS. Again, the *de facto* constraints on regulatory autonomy are likely to be limited as these obligations cannot be enforced through dispute settlement.

6.2 Procurement

Article XIII GATS limits the scope of the most important disciplines in GATS vis-à-vis government procurement. Because of the importance of procurement in international trade, transparency in government procurement was taken up as another of the Singapore Issues.[118] Aside from GATS, the WTO's plurilateral Government Procurement Agreement (GPA) contains disciplines on procurement, The EU is a party to this agreement which was renegotiated and entered into force on 6 April 2014.[119] In addition to these rules, the EU has addressed procurement in the selected RTAs. Although Articles 107.2 EU-C&P, 8.1.2 (d) EU-Singapore and 76.2 EU-Georgia exclude procurement from the scope of the chapter on trade in services and establishment, the respective Title VI, Chapter 10 and Chapter 8, which address government procurement, apply to services as well. For the EU-C&P RTA, this is the case only

[118] WT/MIN(96)/DEC, Singapore Ministerial Declaration (Adopted 18 December 1996) para. 21.

[119] Arie Reich, 'The New Text of the Agreement on Government Procurement: An Analysis and Assessment' (2009) 12 Journal of International Economic Law 989; World Trade Organization, 'Agreement on Government Procurement' (2014) <http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm> accessed 16 October 2014.

insofar as the services are specified in Appendix 1 of Annex XII.[120] Part 2 of Annex 10-E to the EU-Singapore RTA contains the services commitments for the EU for procurement.[121] No such limitation of the scope of the procurement obligations is included in the EU-Georgia DCFTA. The obligations set out in all three sections on government procurement are elaborate. Moreover, an analysis of the constraints on regulatory autonomy that result from these provisions cannot be made without addressing the GPA. Doing so would lead us too far astray in the context of this report. Nonetheless, one may assume that these disciplines contain some additional constraints on regulatory autonomy.

6.3 Investment

Investment is, as noted, partially covered by Mode 3 services supply under the GATS rules. It is also one of the Singapore Issues.[122] The investment relations between EU Member States and the RTA counterparts addressed here are also governed by bilateral investment treaties (BITs).[123] As the analysis of the scope of the services chapters highlighted, there is even more overlap between trade in services and investment within the RTAs' sections on establishment. In addition to these obligations, the RTAs address investment. The EU-C&P RTA, for which negotiations started before the entry into force of the Lisbon treaty reforms which granted exclusive competence on investment to the EU, does not include an investment chapter. Its section on establishment is expressly limited and does not cover *"provisions on investment protection, such as provisions specifically relating to expropriation and fair and equitable treatment, nor does it cover investor-State dispute settlement procedures."*[124] Article 80.2 EU-Georgia states that if parties encounter obstacles to establishment, these obstacles can be

[120] Article 173.2 EU-C&P.

[121] The limitations scheduled in the services and establishment chapter apply *mutatis mutandis* to these commitments. See Note 2 to Annex 10-E to the EU-Singapore RTA.

[122] WT/MIN(96)/DEC, Singapore Ministerial Declaration (Adopted 18 December 1996) para. 20.

[123] There are BITs between:

a. Colombia and, respectively, Belgium and Luxemburg, Germany, Italy and Spain;
b. Peru and, respectively, Belgium and Luxemburg, Czech Republic, Denmark, Finland, France, Germany, Italy, the Netherlands, Portugal, Romania, Spain, Sweden, and the United Kingdom and Ireland;
c. Singapore and, respectively, Belgium and Luxemburg, Bulgaria, Czech Republic, France, Germany, Hungary, Latvia, the Netherlands, Slovakia, Slovenia, and the United Kingdom and Ireland;
d. Georgia and, respectively, Austria, Belgium and Luxemburg, Bulgaria, Czech Republic, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, the Netherlands, Romania, Spain, Sweden, and the United Kingdom and Ireland.

[2013] OJ C131/2, 8 May 2013, List of the Bilateral Investment Agreements Referred to in Article 4(1) of Regulation (EU) No 1219/2012 of the European Parliament and of the Council Establishing Transitional Arrangements for Bilateral Investment Agreements between Member States and Third Countries.

[124] Article 111 EU-C&P, footnote 22.

addressed for example through further negotiations, *"including with respect to investment protection and to investor-to-state dispute settlement procedures."*

The EU-Singapore RTA does contain a Chapter 9 on investment protection, for which the negotiations were finalised in October 2014, over a year after the other parts of the agreement.[125] It applies to all investments made by investors of one party. The main obligations are:

a. a national treatment obligation in Article 9.3 EU-Singapore.[126] The obligation contains a built-in general exceptions provision similar to Articles XIV GATS or XX GATT 1994. It is elaborated in Article 9.5 EU-Singapore as concerns losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot;[127]
b. the obligation to accord in its territory fair and equitable treatment and full physical protection and security to investments of the other party;
c. the obligation to refrain from direct or indirect expropriation;
d. the guarantee that transfer of an investment, or a transfer related to an investment, is free.

These obligations undoubtedly constrain regulatory autonomy in the context of services. Although the provisions in the investment chapter are elaborate, there remains ample room for interpretation. Considering the scope of this report, an analysis of such provisions cannot be conducted here.

6.4 Subsidies

As noted, the services chapters of the selected RTAs exclude subsidies from their scope. However, under GATS, subsidies are not excluded and are subject to the disciplines. Additionally, all three agreements contain transparency obligations for subsidies. In the case of the EU-C&P and EU-Georgia RTAs, no further disciplines on subsidies exist.

[125] The chapter contains ISDS provisions in preliminary Articles 9.14-9.33 and three annexes to elaborate on the rules of such arbitration. Chapter X of the published draft of the Canada-European Union Trade Agreement (CETA) also solely addresses investment. See European Commission, *Consolidated CETA Text* (Published on 26 September, 2014).

[126] Which does not apply to subsidies, procurement and audio-visual services by virtue of Article 9.2.2 and 3 EU-Singapore.

[127] In these situations, requisitioning or destruction of an investment by the party's authorities or armed forces must be compensated, or given restitution.

However, Articles 12.5-12.10 and Annex 12-A EU-Singapore—part of the Chapter on competition and related matters—do contain disciplines applicable to subsidies in services. The definition of subsidies put forth in Article 1.1 SCM Agreement is extended to subsidies granted in relation to the production of services, although this does not prejudice the outcome of negotiations on Article XV GATS. Only specific subsidies within the meaning of Article 2 SCM Agreement are targeted.

The prohibited subsidies listed in Article 12.7 EU-Singapore are considered specific subsidies. For trade in services, the relevant prohibited subsidies are: (i) legal arrangements whereby a party's government is responsible to cover debts or liabilities of certain undertakings without any limitation as to the amount of those debts and liabilities or the duration of such responsibility; and (ii) support to insolvent undertakings in whatever form without a credible restructuring plan and without the undertaking significantly contributing itself to the costs of restructuring. These subsidies are not prohibited if the subsidising party, upon request of the other party, has demonstrated that the subsidy in question does not affect trade of the other party. Moreover, there is an exception for subsidies granted to remedy a serious disturbance in a party's economy, i.e. an exceptional, temporary and significant crisis which affects the whole economy of the party. Subsidies of type (ii) are not prohibited if the subsidies are granted as compensation for carrying out public service obligations.

For subsidies other than those specific subsidies prohibited by Article 12.7, Article 12.8 contains a best endeavour obligation to remedy or remove distortions of competition caused by these subsidies insofar as they (are likely to) affect trade between the EU and Singapore. The parties also agree to exchange information on these subsidies. Annex 12-A to the EU-Singapore RTA elaborates, in paragraph 1, on the 'other subsidies' as defined in Article 12.8 EU-Singapore, stating that these subsidies should, in principle, not be granted when they affect trade between the parties. Paragraph 2 contains exceptions to this principle for specific types of subsidies, given that (i) they are necessary to achieve an objective of public interest; (ii) the amounts of the subsidies involved are limited to the minimum needed to achieve this objective; and (iii) their effect on the trade of the other party is limited. The specific subsidies that may be granted, under these conditions are subsidies:

a. having a social character, granted to individual consumers, provided that such subsidies are granted on a non-discriminatory basis;
b. to make up for damage caused by natural disasters or exceptional occurrences;

c. to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;
d. to remedy a serious disturbance in the economy of one of the parties;
e. to facilitate the development of certain economic activities or of certain economic areas, where such aid does not affect conditions of trade and competition between the parties;[128]
f. to companies that supply clearly defined services of general economic interest, insofar as the subsidies are limited to the costs of providing such services;
g. to promote culture and heritage conservation where these subsidies do not affect conditions of trade and competition between the parties; and
h. to promote the execution of an important project of regional or bilateral interest.

Parties may have recourse to dispute settlement if prohibited subsidies are considered to be granted.[129]

Subsidies are an important policy tool. Disciplining their use must be balanced alongside the potential to grant subsidies. The importance of subsidies becomes evident from the EU's approach in its GATS Schedule and in the services chapters of its RTAs. The most relevant obligation at hand, from the perspective of regulatory autonomy, is the prohibition of two very specific types of subsidies. It is nonetheless notable that these prohibited subsidies *can* be granted. The subsidies need to be justified only *ex post* and upon request of the other party by demonstrating that the subsidy does not affect trade between the parties. Consequentially, the scope of the obligation, the possibility to justify the use of the subsidies and the lack of enforceability through dispute settlement limit the constraints on regulatory autonomy from this obligation.

6.5 Approximation

The EU-C&P and EU-Singapore RTAs do not address approximation. Articles 103, 113, 122, 126 and Annexes XV-A to D, 271-276, 277-278 and 414-417 EU-Georgia contain disciplines on

[128] It is provided in footnote that this category
> *"may include but is not limited to, subsidies for clearly defined research, development and innovation purposes, subsidies for training or for the creation of employment, subsidies for environmental purposes, and subsidies in favour of small and medium-sized companies, defined as companies employing fewer than 250 persons."*

[129] Article 12.14 EU-Singapore.

approximation. The elaborate focus on approximation is in line with Article 1 (h) of the agreement, which sets out the gradual economic integration of Georgia into the EU internal market through comprehensive regulatory approximation as an objective of the agreement. These obligations only apply to Georgia and therefore do not constrain EU regulatory autonomy.

PRELIMINARY CONCLUSION

This report consists of four parts. The first part identifies the selection of case studies for this report, a subsequent report and the doctoral dissertation linked to this research track. On the basis of a mapping exercise of services disciplines in EU RTA chapters and an analysis of treaty interpretation provisions, the EU-Colombia & Peru RTA, the EU-Singapore RTA and the EU-Georgia DCFTA are selected. Subsequently, this section establishes the interpretative framework for the RTAs. It is submitted that there is a presumption to interpret the provisions in the (services chapters of the) RTAs in conformity with WTO obligations. This presumption is rebutted only when there is a clear indication that the negotiators intended to deviate from the interpretation given to terms in the context of the WTO.

The second part of this report addresses the structural flexibilities of the services chapters of the selected EU RTAs, which are situated at the level of the obligations themselves, and of the scheduling approach for specific commitments.

In the third section, the scope of the selected EU RTAs is analysed. Although the scope of the chapters is wider than under GATS, several exemptions are added in comparison to GATS. The main finding of this section relates to the interpretation of the ‘modes of supply’ in the services chapters. In particular, the ‘Mode 3’ equivalent, establishment, gives rise to concern as its interpretation is substantially wider than is the case under GATS in all three RTAs. From a GATS perspective, this is perhaps unexpected, as the approach seems to reflect EU internal market law.

Finally, in section D, the constraints on regulatory autonomy from the unconditional obligations in the services chapters of the selected EU RTAs are assessed. First, it is explained that there is no equivalent to the unconditional MFN obligation in GATS. Second, all transparency obligations in the selected EU RTAs’ services chapters apply unconditionally. Their constraints on regulatory autonomy are, as with GATS, rather limited considering the procedural nature of

most obligations. Even in a case where there could be a substantive element to the obligations, we consider the implications for regulatory autonomy to be minor. Third, we mention one domestic regulation obligation, in the EU-C&P RTA, but do not assess its constraints in this report because of its inseparable link with its conditional counterparts under GATS, the EU-Singapore RTA and the EU-Georgia RTA. Fourth, obligations related to monopolies and exclusive service suppliers are analysed from the perspective of constraints on regulatory autonomy. The obligations related to competition in this context largely refer back to domestic competition law and therefore would not constrain regulatory autonomy. Additionally, there are non-discrimination obligations which constrain regulatory autonomy insofar that they require governments to eliminate any discrimination from the supply of services by state monopolies with a commercial character. Moreover, the EU-Georgia Schedule, contains more extensive commitments compared to GATS and the other two agreements, and constrains regulatory autonomy to some extent. It is possible that this merely reflects reality in a way similar to the binding overhang or 'water' between bound tariff rates and applied tariff rates. Fifth, the obligations related to current and capital transactions are assessed. Aside from assessing the scope of these obligations vis-à-vis those under GATS, we acknowledge that actual constraints are very hard to assess without further in-depth analysis as to whether these concerns are mitigated by specific financial services disciplines in the RTAs. Sixth and finally, the RTAs contain unconditional GATS-X disciplines on competition, procurement, investment, subsidies and approximation. With the exception of investment, most of these provisions either do not constrain regulatory autonomy or are exempted from recourse to dispute settlement.

In conclusion, and unsurprisingly, the unconditional obligations in the EU RTAs' services chapters do not appear to constrain regulatory autonomy unduly. The scope of the chapters, however, does have substantial implications for the analysis of the non-discrimination and market access obligations that are the subject of the next report in this research track.

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We werken samen met een aantal partners: het Antwerp Centre for Institutions and Multilevel Politics, de Vlerick Leuven Gent Management School en H.U.Brussel. Binnen de KU Leuven maken ook collega's verbonden aan de Faculteit Economie, het Instituut voor Internationaal en Europees Beleid, de Onderzoekseenheid Internationaal en Buitenlands Recht, het Instituut voor Internationaal Recht, het Instituut voor Europees Recht en HIVA - Onderzoeksinstituut voor Arbeid en Samenleving deel uit van het project.